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No. _____

In the Supreme Court of the United States

October Term, 1983

MICHAEL O'ROURKE,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the offenses for which petitioner O'Rourke was convicted in Ireland — the design and manufacture of weapons as a member of the Irish Republican Army ("IRA"), solely for the IRA —, and his subsequent escape from prison, are "political offenses" within the meaning of 8 U.S.C. §§1182(a)(9) and (10), which therefore should not serve as a basis for denying discretionary relief under the Immigration and Nationality Act, 8 U.S.C. § 1101, *et seq.* (Petitioner applied for adjustment of status, 8 U.S.C. § 1255, based upon Petitioner's marriage to a United States citizen, political asylum and withholding of deportation, 8 U.S.C. §§ 1158 and 1253(h), voluntary departure, 8 U.S.C. § 1254(e), and waivers of excludability, 8 U.S.C. §§1182(h) and (i)).

2. Whether petitioner should have been granted an evidentiary hearing on alleged government misconduct when the Immigration Judge, upon completion of the testimony and immediately before rendering an opinion, recused himself from the case on the basis of what he termed *government* "harrassment" and "intimidation".

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IMMIGRATION AND NATURALIZATION SERVICE,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Michael O'Rourke, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on February 21, 1984.

OPINION BELOW

The opinion of the Court of Appeals, not for publication, appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on February 21, 1984. This petition is being filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the offenses for which petitioner O'Rourke was convicted in Ireland — the design and manufacture of weapons as a member of the Irish Republican Army ("IRA"), solely for the IRA —, and his subsequent escape from prison, are "political offenses" within the meaning of 8 U.S.C. §§1182(a)(9) and (10), which therefore should not serve as a basis for denying discretionary relief under the Immigration and Nationality Act, 8 U.S.C. §1101, *et seq.* (Petitioner applied for adjustment of status, 8 U.S.C. § 1255, based upon Petitioner's marriage to a United States citizen, political asylum and withholding of deportation, 8 U.S.C. §§1158 and 1253(h), voluntary departure, 8 U.S.C. §1254(e), and waivers of excludability, 8 U.S.C. §§1182(h) and (i)).

2. Whether petitioner should have been granted an evidentiary hearing on alleged government misconduct when the Immigration Judge, upon completion of the testimony and immediately before rendering an opinion, recused himself from the case on the basis of what he termed *government* "harrassment" and "intimidation".

STATEMENT OF THE CASE

On October 30, 1979, petitioner Michael O'Rourke was arrested by agents of the Immigration and Naturalization Service (INS). An Order to Show Cause dated October 30, 1979, alleged that Patrick Mannion a/k/a/ Michael O'Rourke was a native and citizen of the Republic of Ireland and that he had "failed to show the time, place, and manner of [his] entry into the United States," and had thereby violated Section 291 of the Immigration and Nationality Act (INA), 8 U.S.C. §1361. Exhibit 1, Record on Appeal in the Court of Appeal (hereinafter "R") 1527 (Petitioner has not requested that the record or any portion thereof be forwarded to the Supreme Court). On November 29, 1979, INS lodged an additional charge that Petitioner had entered the United States without inspection in violation of 8 U.S.C. §1251(a)(2).

At a subsequent hearing on June 17, 1980, O'Rourke testified regarding his name, place and date of birth, and use of a passport in the name of Patrick Mannion to obtain a visa to come to the United States. R 1076-78. The government lodged an additional charge of deportability, 8 U.S.C. §1251(a)(2), based on petitioner's overstay of his nonimmigrant visa. A further charge of deportability was entered alleging that O'Rourke had willfully failed to comply with the former 8 U.S.C. §1305, by failing to register with the INS after his arrival in the United States.

Based on Petitioner's testimony, Judge Hupp found that he had admitted violating section 241(a)(2) by overstaying his visa. R 1113. The Judge found that there was insufficient evidence to sustain a charge under Section 241(a)(5) (failure to register). *Id.* The charge of entry without inspection was terminated. *Id.*

On May 20, 1981, the hearing reconvened before Judge Hupp. R 833. Based on the agency's approval of an

"immediate relative" petition filed by Petitioner's United States citizen wife, (R 156), Petitioner applied for adjustment of status under 8 U.S.C. §1255.[1]

Mrs. O'Rourke, petitioner's wife, testified, describing the hardship she was suffering because of her husband's (then) 20 months of incarceration. R 912.

Petitioner testified about his IRA involvement.[2]

At the end of 1971, he joined the IRA and went through a military-political training course. R 953. In 1972, he began working full time as an IRA engineer. *Id.*[3] Petitioner

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[1]Petitioner also submitted applications for waivers under § §212(h) and 212(i), because of his possible excludability under § § 212(a) (9) and (10) based on his Irish criminal convictions, and under §212(a) (19) based on the possible materiality of his misrepresentation in obtaining a visa. A group of affidavits from individuals who knew O'Rourke in Philadelphia was submitted as Group Exhibit 37. These affidavits detailed O'Rourke's involvement in Philadelphia's Irish community and revealed a hardworking person, a person greatly concerned with Irish politics, helping others and participating in community athletic and social events. The government agreed to accept these affidavits rather than have each of these individuals come to testify in court and stipulated "that if they were called in this proceeding they would testify as they have alleged in the affidavits presented." R 908.

[2]Mrs. O'Rourke testified that her husband had committed no criminal acts in the United States and had not engaged in any activities on behalf of the IRA in the United States. R 919-20. O'Rourke reiterated that he had resigned from the IRA "around the time I met my wife." R 539. "I think I am accepted by them to have had resigned from the IRA, as I have never reported back to my unit or got in touch with them by any means." R 991. The government cross-examined O'Rourke about his willingness "to renounce the violent methods used by the IRA." R 545. O'Rourke expressed his willingness to "*denounce all violence, and that is the violence also of the British Army.*" R 545-6 (emphasis added).

[3]Petitioner was assigned to the General Headquarters engineering unit. R 954. His role involved setting up and supervising engineering factories to manufacture equipment to be used against British forces in the North. R 955. He testified that these factories manufactured the

explained that the material manufactured at the factory he supervised was destined for Northern Ireland and had a twofold purpose: primarily "for use against the British forces," and secondarily to be used in the event of a British declaration of intent to withdraw to "*protect* Catholics in the Catholic areas to control the leaders of the loyalists." R 964-65 (emphasis added). R 1022 *et seq.* Petitioner testified: "I didn't know the specific target[s]." R 1025. Immigration Judge Hupp sought to end the government's repeated questioning about these targets by stating:

> I think the respondent's answer that he was involved in fabricating bombs and didn't know where they were used and [the government's *suggestion* that] they might have been used on civilians is analogous [to the] situation where Americans used their energy to make bombs in World War II which were used to kill civilians of their enemies in Europe, and elsewhere. . .

O'Rourke further elaborated on his understanding of the IRA policy concerning civilian casualties:

> Your Honor . . . there is an army record that a warning order is in force. It is a court martial offense if a warning has not been given.
>
> Irish Republican Army volunteers have been killed and captured going back in to take out charges that have been planted . . .

(footnote continued from previous page)

casing, propulsion unit, mortar tube, base part, base plant plus the bombs, but not the explosive content of rockets. R 958. O'Rourke directed operations relative to the metal work, research and development for these factories. R 961-64. After completion of the metal work, the bombs or mortars were turned over to the IRA quartermaster. R 1021, 1025. O'Rourke also explained that all material manufactured under his supervision was the property of the IRA and strictly for its use. R 968-69.

Petitioner was never directly involved in the use of weapons or explosives. O'Rourke testified that after his arrest in Ireland, he was convicted in a Special Criminal Court used to try IRA offenses. R 946. He was convicted for possession of weapons and explosives at a factory he supervised and for other materials found at his father's home. R 946-47. He was sentenced to six years in Port Laoise Prison, which is used "to house Republicans."[4] R 947.

Petitioner testified about the circumstances surrounding his escape from prison on July 15, 1976. R 979 *et seq.* He explained that the escape was politically motivated and he was "ordered" to participate by the PIRA command.[5] R 981.

Petitioner testified that IRA staff encouraged him to leave Ireland in the wake of reports from his family and subsequently from a member of the IRA intelligence staff that his life was in danger: "that if I were killed it would solve a lot of questions." R 990. Petitioner subsequently

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[4]O'Rourke described the conditions at Port Laoise Prison:

> what they have done is given us [the IRA] special status. . . [We] have the right to wear our own clothes . . . We have the right not to do prison work . . . [B]asically the day-to-day disciplinary action of the inmates is carried out by the IRA staff, by the O.C. and his agent inside the prison.

R 974. O'Rourke described how prison officers communicated to IRA prisoners exclusively through the IRA officer in command of the unit or his designated staff. R 977.

[5]O'Rourke explained that he had been assigned as engineering officer in the escape from a courthouse where he and several other inmates had been brought as witnesses. R 981. Another individual was the officer in charge. *Id.* Precautions were taken by Petitioner to ensure that there were no injuries and, in fact, none occurred. R 983. Although the other escapees were captured almost immediately, O'Rourke succeeded in escaping. R 984-85.

obtained a passport and visitor's visa in the name of Patrick Mannion and used these to come to the United States. 1007-08.

After hearing this testimony, Judge Hupp asked Petitioner where he would live if the Judge permitted him to remain in the United States. R 1050. The Judge further asked him about his prospects for employment in the United States. R 1052. Judge Hupp subsequently explained to Petitioner that the Immigration Act includes a provision that

> after three years' living in marital union — of course, the time you spent incarcerated is not against you as long as you have been man and wife during that time — you can apply and become a naturalized citizen of the United States.

R 1053.

When the government sought to introduce a report prepared by the Alcohol, Tobacco and Firearms Bureau, Department of Treasury, regarding the substances listed in O'Rourke's Irish conviction records, R 1054-55, Judge Hupp indicated that this report was irrelevant to the adjustment application and declined to accept it: "I don't think I have to go into that. It has no bearing on his eligibility to adjustment. We have belabored the point about the bombs and mortars and I see no point in belaboring it any further."

The Court and the parties plainly viewed the case as nearly completed.[6] The parties were to take the deposition

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[6]Judge Hupp indicated that he felt no additional evidence was needed regarding O'Rourke's activities and convictions in Ireland:

> I have now heard enough of what happened in Ireland. I am [now] interested in what happened in the United States.

R 1056.

of a State Department witness, mail the transcript to Judge Hupp, and the case would be closed. R 1069.

The scenario presented at the conclusion of the May 20, 1981, hearing was greatly altered by unanticipated intervening events. On May 22, 1981, two days after the last O'Rourke hearing, Immigration Judge Ernest Hupp was followed home for more than 120 miles by an unmarked black car with two male passengers in civilian clothing. Judge Hupp, believing IRS sympathizers were following him and that he was in grave danger, eventually pulled into a police station and sought protection. R 310-11. The black car then took evasive action and escaped. The FBI along with other law enforcement agencies were called in to investigate the matter. Convinced that he was a potential target of the IRA, and concerned for his life, Judge Hupp wrote a memorandum to the INS Chief Immigration Judge, dated May 29, 1981, stating that he was recusing himself from the proceedings:

> I have in my opinion been unjustly intimidated and harassed and believe the harassment evolves from my presiding in this case.

Exhibit 40, R 1905.

While Judge Hupp advised both the Chief Immigration Judge and the Central Office of INS of the incident, no one informed him that it was, in fact, INS agents who followed him until the morning of June 5, 1981, the date he had scheduled to formally enter an order recusing himself in the O'Rourke case. R 176. In an Order of Recusement, dated June 5, 1981, Judge Hupp explained the basis for his recusal:

> I am of the opinion that I must at this juncture recuse myself because *I have been unjustly harassed and intimidated because of my presiding in this case.*

> On Friday afternoon, May 22, 1981, I was followed . . . for about 125 miles, before I finally drove into the Millersville, Maryland, police department seeking protection. I then believed that perhaps sympathizers of the IRA movement were trailing me.
>
> [Today] two men from the United States Immigration and Naturalization Service . . . advised [me] that they had followed me on Friday, May 22, 1981, because of an *anonymous* complaint (unfounded of course) they had received about the possibility that I have been leaving Philadelphia Immigration Court on Fridays earlier than 4:30 p.m. without charging proper leave. . .

R 310-11 (emphasis added).[7]

On June 29, 1981, the proceedings were reconvened before Immigration Judge Francis J. Lyons who announced, "I am taking jurisdiction." R 789. Immigration Judge Lyons blocked *any* inquiry into the Judge Hupp incident, stating "*this has absolutely nothing to do with this case.*" R 794 (emphasis added). Nowhere does the record reflect on what facts Judge Lyons reached this conclusion.[8] Over

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[7] As a result of this incident Judge Hupp required "medical care". R 178. In a newspaper article dated June 21, 1981, Judge Hupp's wife is quoted as "speaking for her husband" and states that "the government action [of intimidating the Judge] was prompted by *overzealous immigration officials who suspected that the Judge was prepared to rule in O'Rourke's favor.*" R 150 (emphasis added). Judge Hupp reportedly told his wife "they just wanted to scare me to get me off the case." *Id.* Judge Hupp has been prohibited from speaking about the incident.

[8] While petitioner was denied the opportunity to explore these matters in a *de novo* fashion during his deportation proceeding, the government subsequently and unilaterally submitted declarations

counsel's objection, Judge Lyons resumed and concluded the proceedings. Rather than picking up where Judge Hupp had left off, with no further testimony to be taken other than a deposition, Judge Lyons allowed the presentation of additional witnesses.[9]

On July 12, 1982, Judge Lyons issued his decision denying O'Rourke's various applications for relief from deportation. The Immigration Judge apparently believed that petitioner had engaged in common, non-political offenses. R 10. Petitioner appealed this decision to the Board of Immigration Appeals, which issued a decision dismissing his appeal on May 24, 1983.[10] The Board

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directly to the Board of Immigration Appeals declaring innocence. R 177-179. The agents actually involved in the incident are never identified. INS claims that Judge Hupp was followed home for 125 miles by INS agents because of an "anonymous" complaint that he was leaving work early. R 165. This anonymous complaint was allegedly received "on February 11, 1979," *more than two years before he was followed home. Id.* An "investigator" was not "assigned" to investigate Judge Hupp until February 1981, after petitioner's deportation proceedings were initiated. R 175. He was not followed home until two days after the O'Rourke hearing had ended.

[9]However, when Petitioner's counsel sought to elicit additional testimony from Petitioner regarding his reasons for engaging in the activities which led to his Irish criminal convictions, Judge Lyons stated, "I don't need to hear what has already been heard by Mr. Hupp."

> MR. MYERS: Your Honor, we have a continuing objection to your refusing to judge the credibility and demeanor of witnesses and only trying to judge it based on reading the record. . .
>
> THE COURT: I don't need repetition of all of the testimony before Judge Hupp. R 769.

[10]The Board — misstating the facts — found that "[O'Rourke's] indiscriminate terrorist use of explosives is atrocious in nature and out of proportion to the political goal of ending British domination over

denied the applications for adjustment of status, political asylum, withholding of deportation based on fear of political persecution, and for voluntary departure in lieu of formal deportation. The Board held, *inter alia*, that Petitioner's admission would be detrimental to U.S. relations with the Republic of Ireland and Great Britain. R 5 and 7. An appeal was taken to the Second Circuit Court of Appeals pursuant to 8 U.S.C. §1105a. The Court of Appeals dismissed the appeal by opinion dated February 21, 1984. *See* Appendix.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With the Decisions of The United States Supreme Court and Other Courts Concerning The Meaning of "Political Offense" as That Term is Used to Distinguish Political From Common Criminal Conduct

The Court of Appeals held that "petitioner's crimes were not political." And the "Republic of Ireland has a valid nonpolitical interest in protecting its citizens from serious crimes." The possession of firearms and explosives "*presents a potential threat to any society in terms of danger to person and property, no matter who is the possessor or what his motives might be.*" (Emphasis added.) Petitioner respectfully suggests that the lower court failed to apply the proper legal standards in evaluating the "political" versus "common" nature of Petitioner's Irish convictions. This Court has only once addressed the issue, in *Ornelas v. Ruiz*, 161 U.S. 502 (1896).

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Northern Ireland." The Board also found that Petitioner's contention that "[Judge Hupp] would have ruled differently, but was intimidated into withdrawing, is neither supported by the record nor any longer relevant . . ." R 8.

8 U.S.C. Sections 1182(a)(9) and (10) specify that excludability of immigrants cannot be premised on purely "political" offenses. *See generally* Gordon and Rosenfield, *Immigration Law and Procedure*, Section 2.43d, page 2-317 (1981). This section benefits those whose punishment emerged from political activities rather than common crimes. H. Rep. 2096, 82d Cong., 2d Sess., 127.

(i) Overview of the Law on "Political Offenses"

Given the paucity of authority on interpretations of Sections 1182(a) (9) and (10), the Board of Immigration Appeals relies upon extradition cases in determining what is a "political" versus "common" offense. *See, e.g., Matter of K*, 4 I&N Dec. 108, 110-116 (1950). Many American judicial interpretations of the political offense exception, as well as decisions of the Board of Immigration Appeals, begin their analysis with the seminal British case, *In Re Castioni*, [1981] 1 Q.B. 149.[11] The British court maintained that persons should not be returned to

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[11]The issue posed in *Castioni* was whether "the man was acting as one of a number of persons engaged in acts of violence of a political character with a political object, and as part of the political movement and rising in which he was taking part." *Id.*, at 159. The "incidence" test was later significantly diluted by the decision in *Ex Parte Kolczynski*, [1954] 1 Q.B. 540. In *Kolczynski* seven members of a Polish fishing vessel avoided extradition even though the Polish government accused them of common crimes, including wounding a member of the crew of their ship and revolting on board. Their actions were characterized as political although not taking place in Poland. The decision recognized that in the contemporary spectrum an "offense may be directed from foreign territory." Garcia-Mora, *The Nature of Political Offenses: A Knotty Problem of Extradition Law*, 48 Virginia Law Review 1226, 1242 (1962). Rather than determining whether the actions in questions were "incidental" to a political disturbance, the *Kolczynski* decision examined the "political character" of those actions and denied extradition.

governments where they face prosecution for crimes "if those crimes were incidental to and formed a part of political disturbances." *In Re Castioni, supra,* at 166.

The British court held in *Schtraks v. Government of Israel,* 3 All England Law Reports 529, 534 (1962), that

> [the political offense exception cannot] be limited to cases of open insurrection. An underground resistance movement may be attempting to overthrow a government, and it could hardly be that an offense, committed the day before open hostilities broke out, would be treated as non-political, while a precisely similar offense, committed two days later would be of a political character.

Ibid.

American extradition practice regarding the political offense exception is historically traceable to the *Castioni* case and its progeny. The American position was first illustrated by *In Re Ezeta,* 62 Fed. 972, 977-999 (N.D. Cal. 1894), in which the Salvadoran government sought the extradition of several people charged with murder and robbery. The acts took place while combatting a revolution and the district court denied extradition because the crimes were "associated . . . with the actual conflict of armed forces, [and] are of a political nature." *Id.*, at 999.

Two years later the Supreme Court issued its decision in *Ornelas v. Ruiz,* 161 U.S. 502 (1896).[12] The Court held that given "the character of the foray, the nature of

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[12]In *Ornelas* the Republic of Mexico sought the extradition of three individuals who had crossed from the U.S. into Mexico with a band of about 140 armed men, and then, acting as a group, attacked, pillaged, kidnapped, robbed and terrorized forty Mexican soldiers and a town and its citizens. They were later charged with murder, arson, robbery and kidnapping. *Id.*, at 511-2.

the attack, the persons killed or captured, and the kinds of property taken or destroyed," the petitioners were not in aid of a political revolt, an insurrection or a civil war. *Id.*, at 511.[13]

In *In re Extradition of McMullen*, 28 Cr. L. Rptr. 2274 (June 20, 1979), Magis. Case No. 3-78-1099MG (N.D.Cal. May 11, 1979), the Government of the United Kingdom sought the extradition of McMullen, an established member of the PIRA for the alleged bombings of certain British army installations. The court held that (1) an insurrection or political disturbance did exist, *In re McMullen*, at 4, (2) that Britain and its military facilities were the main targets of the PIRA, *Id.*, at 2, and (3) with respect to the crime, McMullen acted as a member of the PIRA. *Id.* After studying the history and activities of the PIRA — for which Petitioner in this case designed arms — the court stated that the "organization within and without the borders of Northern Ireland has continued to press and to this day continues to fight for Northern Ireland's independence from British rule." *Id.*, at 2. The court also noted that "the British army and its facilities were prime targets for the PIRA's guerilla warfare." *Id.*, at 5. The

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[13]In *Ramos v. Diaz*, 149 F.Supp. 459 (S.D. Fla. 1959), the Government of Cuba sought extradition of two escapees from a Cuban prison who had been convicted of murdering a prisoner immediately after the fall of the Batista Government. The escapees were Castro supporters and soldiers. The court found that the defendants were active participants in the revolutionary movement, that the crime was "part of a political uprising and disturbance," and that the defendants "bore no ill-will or malice toward their victim, who was just one of many political prisoners captured in furtherance of the political rising." *Id.*, at 463. Despite the lack of exact contemporaneity with a political uprising, and although the defendants were part of the party which now controlled Cuba, the court held that the alleged crime was a non-extradictable political offense. *Id.*, at 463-64.

court concluded that the defendant's acts were not motivated by vengeance or personal motives, but that his act "was a crime incident to . . . a political disturbance, uprising . . . and in furtherance thereof." *Id.*, at 5-6.[14]

Still more recently the political offense exception was dealt with in *In the Matter of Mackin*, 80 Cr. Misc. 1, p. 50 (S.D.N.Y. August 13, 1981), *aff'd United States v. Mackin*, 668 F.2d 122 (2d Cir. 1981). Mackin, like McMullen and Petitioner herein, was a member of the PIRA. He was indicted in Northern Ireland for attempted murder and other charges including possession of explosives. *Id.*, at 124. Like Petitioner herein, he was captured and then escaped coming to the United States illegally. *Ibid.* The magistrate held that

> while this one act [shooting a soldier] could not possibly bring to fruition the goals of the PIRA, it was undoubtedly free from personal motive and substantially linked to the traditional goals and strategy of the IRA and PIRA: an independent Ireland, free from British rule through the use of violence.

Id., 80 Cr. Misc. at 98.

In *Matter of K, supra*, the leading Board of Immigration Appeals decision on the political offense exception, the Board was called upon to rule whether a crime was a purely political offense and therefore not a ground for excludability. Noting the complete absence of legislative history on the meaning of a purely political offense, the Board concluded that "in order for an offense to constitute a political one, there must be concerted action for a

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[14]The U.S. Government was later unsuccessful in deporting McMullen. He was granted political asylum by order of the Ninth Circuit Court of Appeals. *McMullen v. INS*, 658 F.2d 1312 (9th Cir. 1981).

political purpose." *Id.*, at 118. The Board also articulated the test as follows:

> [A] person acting as one of a number of persons engaged in acts of violence of a political character, with a political object, and as part of the political movement and rising in which he is taking part is a political offender and so entitled to asylum in this country . . .

Matter of K, supra, at 115. The respondent in *Matter of K* was convicted in Poland for killing the Russian Ambassador. *Id.*, at 109. He acted alone and not as part of a political rising and his acts were therefore deemed to be common crimes. *Id.*, *at* 118.

The lower courts are clearly in need of guidance on the appropriate standards to use in evaluating the difference between "political" and "common" crimes.

Applying the standards described above to the facts in this case, it is clear that (1) there was an on-going rebellion or political disturbance at the time of the offenses in question, (2) Petitioner was a member of the uprising group, and (3) the offenses were incidental and in furtherance of the political disturbance.

(II) Severe Political Disturbances Existed

Since 1921 the island popularly known as Ireland has been divided into two states: the southern portion, presently the Republic of Ireland, and the northern portion, part of the United Kingdom. *Mackin, supra,* at 49. In every decade since the establishment of the Northern Ireland state,

> the IRA and its ideological successor, the PIRA, has engaged in sporadic armed violence in opposition to British domination, in support of

> an independent, unified Irish nation, and, during the last fifteen years, in response to the Unionist Government's discrimination against the Catholic minority.

Id., at 55. In response, "both the [British] Parliament and the Dublin government in the Republic [of Ireland] introduced internment without trial, arresting people who were identified as members of the IRA." *Ibid.* The court in Mackin described the PIRA as being involved in a "quasi-military conflict." *Id.*, at 63. The British government has described the conflict with the PIRA as follows:

> "[The PIRA is] committed to a long-term campaign of attrition against the British in the north of Ireland, with the overall objective of a nationalist state, an independent Ireland; with the overall objective of driving the British army out of Northern Ireland and of joining the Northern Ireland state to make a united Ireland with the South."

Id., at 64.

While Petitioner's activities took place in the Republic of Ireland, not in the north, the Immigration Judge concluded that the IRA's and PIRA's "organizational and operational activities have also been carried on in the Republic of Ireland." R 19. The court in *Mackin* likewise found that the PIRA's activities took place in the north, "and at a later stage in the Republic of Ireland . . ." *Mackin, supra,* at 59.

(iii) Petitioner's Participation in the Political Disturbance

As discussed in the Statement of the Case, petitioner testified extensively about his involvement in the PIRA. R 945, *et seq.* Immigration Judge Lyons found that Petitioner

was "a member of the IRA." R 19. And, "*[t]he criminal activities for which he was convicted were undertaken on behalf of the IRA and PIRA . . .*" *Ibid.* (emphasis added). The Judge also found that Petitioner's "*unlawful activities stemmed from his membership in the Provisional Irish Republican Army.*" R 3 (emphasis added).

In the words of the Board of Immigration Appeals, Petitioner was engaged in "concerted action" rather than individual acts. *In the Matter of K, supra,* at 118.

(iv) Petitioner's Acts Were Incidental to or In Furtherance of a Political Disturbance

In this case the Petitioner's acts were carefully pre-planned and directed by the PIRA. Petitioner was not engaged in individual acts nor did he commit acts of indiscriminate violence. He was informed that the weapons he designed and manufactured were for use solely by the PIRA against "British occupation forces . . ." R 959. Not for the "bombing of civilians." R 1031.

Petitioner's activities were clearly "incidental" to the military objectives of the PIRA. *Garcia-Guillen v. United States,* 450 F.2d 1189 (9th Cir. 1971), *cert. denied,* 405 U.S. 989. There was a "substantial tie" between his acts and the goals of the PIRA. *Abu Eain v. Wilkes,* 641 F.2d 504 (7th Cir.), *cert. denied* 102 S.Ct. 390 (1981).

The Immigration Judge, Board of Immigration Appeals, and Court of Appeals all relied almost exclusively on Petitioner's conduct in Ireland as the basis for denying discretionary relief from deportation. The complete failure of the Court of Appeals to address the historical standards used in American jurisprudence to evaluate the political nature of offenses, and the general lack of authoritative precedents in this area, justify the grant of certiorari to review the judgment below.

2. The Decision Below Raises Significant and Recurring Problems Concerning Resolution of Prejudicial Government Misconduct in Deportation Proceedings

The original Immigration Judge in this case, Ernest Hupp, after concluding the proceedings, except for a deposition to be taken outside of his presence, recused himself on the ground that the government had "intimidated" and "harassed" him. R 310-11, 1905. Judge Hupp stated that he "sincerely believed" that this intimidation occurred "because I have been involved in the O'Rourke case." R 311.

Petitioner's attempted inquiry into these events was blocked by the new Immigration Judge assigned to the case. In fact, "efforts by Petitioner's counsel to investigate the allegations of Judge Hupp have been thwarted by INS [which] has built a wall of silence around the matter. . ." R 149. *Judge Hupp himself was ordered "not to discuss the matter on pain of administrative action." Id.* (emphasis added).

The Board of Immigration Appeals, ignoring the *possibility* that government misconduct might have occurred, concluded only that this issue was no "longer relevant, because of our independent review of the evidence of appeal." *Id.* at 7. The Court of Appeals found the issue to be so lacking in substance as to "merit no discussion." Appendix.[15]

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[15]Only because of a declaration filed by INS directly with the Board of Immigration Appeals after the record had closed — and thus never subject to cross-examination — we are informed by a government agent (we do not even know if he was one of the agents who actually followed Judge Hupp - his declaration says nothing about this) that "this investigation was entirely unconnected to the proceedings against Michael O'Rourke." R 175. The declaration states that neither the Assistant U.S. Attorney representing the government in

Petitioner had a due process right to a *fair* deportation hearing, free of prejudicial government misconduct. *Yamataya v. Fisher*, 189 U.S. 86 (1903); *Ng Fung Ho v. White*, 259 U.S. 276 (1922); *Bridges v. Wixon*, 362 U.S. 135 (1945); *Sung v. McGrath*, 339 U.S. 33 (1950); *Accardi v. Shaughnessy*, 347 U.S. 260 (1954). This right is beyond doubt. The deportation hearing must conform to traditional standards of fairness.

Petitioner timely sought and *continues to seek the opportunity to obtain and present evidence* (including perhaps administrative discovery pursuant to 8 C.F.R. §287.4), and to cross-examine the government's affiants, R 175-182, regarding the Judge Hupp incident.

Since respondent so avidly relieds upon *ex parte* government declarations to establish the *absence* of government misconduct during Petitioner's deportation hearing, Petitioner is clearly entitled to the *right* to cross-examine the affiants and present counter-evidence.

8 U.S.C. 1252(b) provides that the "alien shall have a reasonable opportunity" to examine the evidence against him and present evidence on his own behalf. On the right to cross-examination in deportation hearings, *see Baliza v. INS*, 696 F.2d 1243 (9th Cir. 1982); *Maltez v. Nagle*, 27 F.2d 835 (9th Cir. 1982); *Hays v. Hatges*, 94 F.2d 67 (8th Cir. 1981); *Navarette v. Landon*, 223 F.2d 234 (9th

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(footnote continued from previous page)

Petitioner's deportation hearing nor the local INS District Director "had any knowledge of this Administrative Investigation until May 29, 1981," a few days after Judge Hupp was followed. R 175. The declaration does *not* state that other INS agents involved in the O'Rourke proceedings were also so *un*informed. *Id.* This Court might well question whether an INS agent would conduct an investigation of an Immigration Judge in a local INS office without advising the INS District Director.

Cir. 1955); *United States v. Brough,* 15 F.2d 377 (2d Cir. 1956), *cert. denied,* 351 U.S. 911 (1956); *Sardo v. McGrath,* 196 F.2d 20 (D.C. Cir. 1952).

In this case the affiants (whose declarations were not added to the record until after the deportation hearing) and those involved in the Judge Hupp incident were available as witnesses. Respondent argued in the Court of Appeals that Judge Lyons, who replaced Judge Hupp, was "well within his discretion" in denying Petitioner's request for an evidentiary hearing on the circumstances surrounding Judge Hupp's recusal. We respectfully suggest that Judge Lyon's discretion was circumscribed by the due process clause of the Fifth Amendment which guarantees a *fair* deportation hearing.

The Board of Immigration Appeals and the federal courts have repeatedly reversed deportation orders where serious government misconduct is shown. *U.S. ex rel. Accardi v. Shaughnessy,* 347 U.S. 260, 267 (1954); *Benitez-Mendez v. INS,* 707 F.2d 1107 (9th Cir. 1983); *Lopez-Mendoza v. INS,* 705 F.2d 1059 (9th Cir. 1973); *Navia-Duran v. INS,* 568 F.2d 803 (1st Cir. 1977); *Cheung v. INS,* 418 F.2d 460 (D.C. Cir. 1969); *Matter of Garcia-Flores,* Interim Decision No. 2780 (BIA 1980).

Deportation "visits a great hardship on the individual . . ." *Bridges v. Wixon,* 362 U.S. 135, 136 (1945). Mr. Justice Brandeis noted that deportation often involves the loss of "all that makes life worth living . . ." *Ng Fung Ho v. White,* 259 U.S. 276, 284 (1922). Where potential government misconduct takes place — and particularly where the Immigration Judge himself withdraws from the case based on his allegation of government "harassment" and "intimidation" — the respondent in a deportation hearing should, at least, be entitled to an evidentiary

hearing on the issue. Such a hearing was denied in this case. The INS ordered Judge Hupp not to speak out about his recussal upon pain of "administrative action."

The due process clause must require a remand for further proceedings and the formulation of a remedy by the Immigration Court in the event that prejudicial government misconduct is established.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully Submitted,

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Appendix

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 21st day of February, One Thousand Nine Hundred and Eighty-four.

PRESENT:

HON. WILLIAM H. TIMBERS, Circuit Judge
HON. ELLSWORTH A. VAN GRAAFEILAND, Circuit Judge
HON. EDWARD D. RE, Chief Judge, U.S. Court of International Trade*

MICHAEL O'ROURKE,

Petitioner,

v.

U.S. IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

ORDER
83-4107

FILED: February 21, 1984

* Sitting by designation

Michael O'Rourke petitions this Court, pursuant to 8 U.S.C. § 1105a for review of a decision of the Board of Immigration Appeals (BIA), dated May 24, 1983, that dismissed his appeal from a decision of Immigration Judge Lyons, dated July 12, 1982. The judge's decision denied O'Rourke's application for adjustment of his nonimmigrant status under section 245 of the Immigration and Nationality Act of 1952, as amended, (Act) 8 U.S.C. § 1255, denied his request for waiver of inadmissability under sections 212(h) and (i) of the Act, 8 U.S.C. § 1182(h) & (i), denied his request for asylum as a political refugee under section 208 of the Act, 8 U.S.C. § 1158, denied his request for withholding deportation to the Republic of Ireland under section 243(h) of the Act, 8 U.S.C. § 1253(h), and denied his request for voluntary departure under

section 244(e) of the Act, 8 U.S.C. § 1254(e). The judge accordingly entered an order for petitioner's deportation. In addition to rejecting petitioner's claims that these denials were erroneous, the BIA rejected petitioner's contention that he had been deprived of due process in the deportation proceedings.

The adjustment of an alien's status under 8 U.S.C. § 1255 is committed to the discretion of the Attorney General and, in turn, to those to whom he delegates the administration of the immigration laws. Similarly, grants of asylum under 8 U.S.C. § 1158 and voluntary departure under 8 U.S.C. § 1254(e) are committed to the discretion of those who administer the Act. We find no abuse of discretion in this case. Petitioner entered the United States by using a false name and a false

passport. In order to obtain a visa, he lied not only about his identity, but also about his purpose in coming to this country. He overstayed the time permitted under the visa that he had obtained by misrepresentation. During the early stages of his deportation proceedings he refused to cooperate, even to the extent of revealing his true identity. These acts support the denial of discretionery relief. See Jain v. INS, 612 F.2d 683 (2d Cir.1979), cert. denied, 446 U.S. 937 (1980); Fulgencio v. INS, 573 F.2d 596, 597-98 (9th Cir. 1978). Petitioner's marriage to an American did not mandate a different conclusion. Although marriage to an American may be a significant factor favoring adjustment, it does not necessarily outweigh negative factors, even in cases where a wife's dependence on her

spouse is far greater than the dependence apparent here. See Noori-Khajavi v. INS, 548 F. Supp 150, 154 (E.D. Mo. 1982). The conclusion that petitioner had not shown sufficient equities to overcome the numerous factors weighing against adjustment was not arbitrary, capricious or an abuse of discretion. See Santos v. INS, 375 F.2d 262, 264 (9th Cir. 1967).

Petitioner argues that the BIA erred in failing to consider whether his crimes in the Republic of Ireland were political offenses and thus not a ground for exclusion. He contends that, unless the BIA first determined that his crimes were nonpolitical, they could not consider the crimes as a factor in deciding whether to grant adjustment. This argument founders on the fact that, insofar as they relate to the Republic of Ireland, petitioner's

crimes were not political. Moreover, petitioner's contention overlooks the many factors other than petitioner's convictions which warranted an exericse of discretion adverse to petitioner.

The BIA's denial of petitioner's request for withholding deportation under 8 U.S.C. § 1253(h) also was proper. The test for withholding deportation under section 1253 is whether the applicant has a well-founded fear of persecution on account of race, religion, political opinion, nationality or membership in a particular social group. See Stevic v. Sava, 678 F.2d 401, 404-09 (2d Cir. 1982), cert. granted sub nom., INS v. Stevic, 103 S. Ct. 1249 (1983); 8 U.S.C. §§ 1101(a)(42), 1253(h). Petitioner proffers vague and general claims that he fears for his life in the Republic of Ireland because of various incidents in

which the Provisional Irish Republican Army was allegedly involved as a basis for a well-founded fear of political persecution. Although it is not necessary under section 1253(h) to show a clear probability of persecution, see Stevic v. Sava, supra, 678 F.2d at 409, the reasonableness of an applicant's fear remains a factor. Id. However, petitioner has not shown, through his vague and general claims, that his fear is reasonable. The very fact that he was willing to remain in the Republic of Ireland for a year or so after first learning of the alleged threat and that he had expressed the intent to return to his homeland belies the existence of even subjective fear.

Petitioner's argument that he has a well-founded fear of political persecution rests primarily on the claim that

his offenses were political and that punishment for them would be persecution. This is not a persuasive argument. The Republic of Ireland has a valid nonpolitical interest in protecting its citizens from serious crimes. The illegal possession of explosives and firearms presents a potential threat to any society in terms of danger to person and property, no matter who is the possessor or what his motives might be. The nonpolitical nature of the Irish Government's interest and the serious nature of the crime removes prosecution and punishment for these offenses from the realms of political persecution. See Note, The Right of Asylum in United States Law, 80 Colum. L. Rev. 1125, 1146 (1980). The Republic of Ireland also has a valid nonpolitical interest in prosecuting those who escape from prison, particularly when explosives

are used to accomplish the escape. As pointed out in the United Nations Handbook of Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, Paragraph 84 (Geneva 1979), where anticipated punishment conforms with the general law of the punishing country, fear of prosecution alone will not make an applicant a political refugee.

Finally, although petitioner claims that he will be imprisoned for a term of anywhere from 18 years to life for his escape and that, therefore, his punishment will be excessive and constitute persecution, he present no proof that his fear is justified. Instead, he relies on his unsubstantiated assertions about the sentences he could anticipate. While in some cases all that will be available

concerning persecution is the applicant's testimony, on an issue such as criminal sentencing in the Republic of Ireland, where proof is readily available, failure to produce it supports a conclusion that the fear is not well-founded. We conclude that petitioner's application for political asylum under 8 U.S.C. § 1253(h) was properly denied.

Petitioner's due process claims arising out of Judge Hupp's decision to recuse himself are so lacking in substance as to merit no discussion.

The petition for review is denied. Mandate shall issue forthwith.

Hon. William H. Timbers

Hon. Ellsworth A. Van Graafeiland

Hon. Edward D. Re

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 256 South Occidental Boulevard, Los Angeles, California 90057; that on March 30, 1984, I served the within *Petition For A Writ Of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, U.S. Supreme Court
One First Street, N.E.
Washington, D.C. 20543
(Hand delivered: forty copies and original.)

Solicitor General
Department of Justice
Washington, D.C. 20530
(Three copies)

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 30, 1984, at Los Angeles, California.

Carlos Holguin
(Original signed)

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Supreme Court, U.S.
FILED
JUN 11 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1615

In the Supreme Court of the United States

October Term, 1983

MICHAEL O'ROURKE,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

MOTION AND MEMORANDUM SUGGESTING THAT CONSIDERATION OF PETITION FOR WRIT OF CERTIORARI BE DEFERRED

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MOTION AND MEMORANDUM SUGGESTING THAT CONSIDERATION OF PETITION FOR A WRIT OF CERTIORARI BE DEFERRED

The Petitioner in the above-entitled case files this memorandum to suggest that the Court postpone a decision on his Petition for a Writ of Certiorari pending disposition of his motion to reopen and/or reconsider his deportation order filed with the Board of Immigration Appeals. See Exhibit "A" attached hereto and incorporated by this reference; see also, Murray v. City of New York, 308 U.S. 528, 310 U.S. 610, 311 U.S. 720; Winkler and Smith Co. v. Sunkist Growers, Inc., 370 U.S. 19; Keney v. New York, 388 U.S. 440.

The questions which Petitioner seeks to raise herein are twofold:

(1) Whether the offenses for which he was convicted in Ireland -- the design and manufacture of weapons as a member of and solely for the Irish Republican Army --, and his subsequent escape from prison, are "political offsenses" within the meaing of 8 U.S.C. Sections 1182(a)(9) and (10), which therefore should not serve as the basis for denial of discretionary relief under the Immigration and Nationality Act, and

(2) Whether Petitioner should have been granted an evidentiary hearing on alleged government misconduct when the Immigration Judge, upon completion of the testimony and immediately before rendering an opinion, recused himself from the case on the basis of what he termed government "harrassment" and "intimidation."

At the time of the close of the administrative record in this case Respondent was not in possession of any evidence concerning the recusal of Immigration Judge Ernest Hupp other than the Judge's statements made in his recusal order. Since then Respondent has obtained a handful of INS and other government documents under a Freedom of Information Act request. The great majority of documents sought concerning the recusal of Judge Hupp have not yet been produced for inspection and Petitioner has initiated an action under the Freedom of Information entitled O'Rourke, et a. v. Department of Justice, et al. No. 83-Civ-5142-RJW (Southern District of New York).

Based on the douments already received under the FOIA, Petitioner has filed a motion to reopen and/or reconsider with the Board of Immigration Appeals. Exhibit A, supra. Documents obtained under the FOIA and copies of recent letters received from members of Congress indicate that:

1. INS had no reasonable basis for following Judge Ernest Hupp for approximately 5 hours on May 22, 1981;

2. The INS agents -- in a black sedan and wearing civilian clothes -- followed Judge Hupp in a manner designed to insure that he knew he was being followed;

3. INS agents actively evaded local police contacted by Judge Hupp for "protection";

4. Respondent's case files were removed from Judge Hupp's desk by INS agents before he filed a formal motion recusing himself from the case;

5. Judge Hupp intended to grant Petitioner's applications for discretionary relief from deportation;

6. Judge Hupp feared for his life and his wife's life because of the incident in which he was followed home by INS agents (Judge Hupp thought he was being "stalked by assassins" according to a Secret Service memorandum obtained under the FOIA);

7. INS agents claim that they followed Judge Hupp because of an "anonymous" written tip -- never produced -- that he was leaving work early without authorization;

8. Judge Hupp withdrew from Petitioner's deportation case -- immediately before rendering a decision -- before being advised by the government that he was followed by INS agents, not IRA supporters or members;

9. Judge Hupp believes that INS not only "intimidated" and "harrassed" him off the case, but also that INS subsequently engaged in a "cover-up" of the entire operation;

10. Documents obtained under the FOIA indicate that INS had prejudged Petitioner's case, that his attorney-client relationship might have been penetrated, and that INS agents falsely informed members of the public -- in writing -- that Petitioner had killed law enforcement officers in Ireland.

Petitioner requests that this Court postpone a decision on his pending Petition for a Writ of Certiorari until such time as the Board of Immigration Appeals has ruled on his motion to reopen and/or reconsider based upon the new evidence obtained relevant to the unfairness of his initial deportation hearing. In the event that the Board of Immigration Appeals reopens Petitioner's deportation hearing, his Petition for a Writ of Certiorari might become moot.

Dated: June 7, 1984

Respectfully submitted

Peter A. Schey
Counsel for Petitioner

BOARD OF IMMIGRATION APPEALS

UNITED STATES DEPARTMENT OF JUSTICE

IN THE MATTER OF:	)	A22 607 396
	)	
	)	MOTION TO REOPEN
MICHAEL O'ROURKE	)	AND/OR RECONSIDER
	)	

I

INTRODUCTION

Pursuant to 8 C.F.R. Section 3.2, Respondent Michael O'Rourke brings this motion to reopen and/or reconsider the decision rendered by this Board on May 24, 1983, dismissing his appeal from a decision of Immigration Judge Lyons, dated July 12, 1982.

The regulations and precedent decisions thereunder recognize the right of the Board of Immigration Appeals to reopen and/or reconsider its decisions on application of the Respondent.

Respondent also respectfully requests that a stay of deportation issue pending the issuance of a decision on this motion for reopening and/or reconsideration.

The motion to reopen is made on the basis of new evidence obtained by Respondent which was not previously available to him and which is material to the issue of government misconduct during his initial deportation hearing. The motion to reconsider seeks further consideration by this Board of its initial decision that government misconduct during Respondent's deportation hearing is

irrelevant in light of this Board's de novo review of the Immigration Judge's decision.

The new documents submitted herewith establishes prima facie evidence that:

1. Immigration Judge Ernest Hupp engaged in no wrong-doing giving rise to his being followed by a black sedan automobile containing INS agents in plainclothes for a number of hours after leaving the Immigration Court on May 22, 1982;

2. Judge Hupp was followed in a manner meant to insure that he would be aware of the fact that he was being followed and thereby to intimidate and frighten him;

3. The INS agents following Judge Hupp actively alluded local police who he contacted for protection;

4. Judge Hupp immediately advised INS that he believed that he was followed by IRA supporters who might have targetted him for assassination, and required medical treatment following the incident;

5. Despite an immediate investigation into the matter, including the involvement of the FBI, INS did not advise Judge Hupp that INS rather than the IRA had followed him until the day he entered a formal recusal notice in the administrative file, which was after he already considered himself recused and had infgormed INS of his recusal;

6. Judge Hupp did intend to rule in favor of Michael O'Rourke, and had given indication of his intention;

7. INS engaged in a "cover-up" of their activities in this incident;

8. Had Judge Hupp been immediately or timely notified that it

was INS and not the IRA which had followed him, he would not have recused himself from the O'Rourke case.

9. INS has engaged in a concerted campaign to publicly spread malicious and false information about Michael O'Rourke;

10. Either INS or some other enforcement agency working in conjunction with INS might have penetrated Respondent's attorney-client relationship.

Respondent has suffered no criminal convictions in the United States and is currently not a defendant in any criminal proceedings.

If significant government misconduct was involved in causing Judge Hupp's recusal, Respondent did not receive a fair deportation hearing as required by the Fifth Amendment's due process clause. Under such circumstances remedial action should be taken by this Board, including possible remand for a new deportation hearing. Under no circumstances can the due process clause (or the integrity and independence of Immigration Court) allow that a hearing in which the INS intimidates an Immigration Judge off a case simply continue in front of a new Immigration Judge.

II

Procedural Posture of the Case

On October 30, 1979, Respondent Michael O'Rourke was arrested by agents of INS. An Order To Show Cause dated October 30, 1979, alleged that Respondent was a native and citizen of the Republic of Ireland and that he had "failed to show the time, place and

manner of entry into the United States." On November 29, 1979, INS lodged an aditional charge that Respondent had entered the United States without inspection in violation of 8 U.S.C. Section 1251(a)(2).

At a hearing held on June 17, 1980, Respondent testified regarding his name, place and date of birth, and use of a passport in the name of Patrick Mannion to obtain a visitors visa to come to the United States. The INS lodged an additional charge of deportability, 8 U.S.C. Section 1251(a)(2), based on Respondent's overstay of his non-immigrant visa. A further charge of deportability was entered alleging that Respondent had failed to comply with former 8 U.S.C. Section 1305, by failing to register with INS after his arrival in the United States.

Based on Respondent's testimony, Immigration Judge Ernest Hupp found that he had violated INA Section 241(a)(2), 8 U.S.C. Section 1251(a)(2) by overstaying his visa. The Judge found that there was insufficient evidence to sustain a charge under Section 241(a)(5), 8 U.S.C. Section 1251(a)(5) (failure to register).

On May 20, 1981, the hearing reconvened before Judge Hupp. Based on the approval of an immediate relative petition filed by Respondent's wife, Respondent applied for adjustment of status under 8 U.S.C. Section 1255. Respondent also submitted applications for waivers under INA Sections 212(h) and 212(i), because of his possible excludability under Section 212(a)(9) and (10) based on his Irish criminal convictions, and under Section 212(a)(19) because of the possible materiality of his misrepresentations in obtaining a visa.

Respondent testified extensively about his IRA activities in

Ireland, his arrest and conviction there, and his subsequent escape from custody and flight to the United States.

At the end of 1971 Respondent joined the IRA and went through a military-political training program. In 1972, he began working full time as an IRA engineer. Respondent explained that the material manufactured at the factory that he supervised was destined for Northern Ireland and had a twofold prupose: primarily "for use against the British forces," and secondarily to be used in the event of a British declaration of intent to withdraw to "protect Catholics in the Catholic areas to control the leaders of the loyalists." (Emphasis added). Respondent testified: "I did not know the specific targets."

Immigration Judge Hupp sought to end the Government's repeated questioning about the targets by stating:

> I think the respondent's answer that he was involved in fabricating bombs and didn't know where they were used and [the government's suggestion that] they might have been used on civilians is analogous [to the] situation where Americans used their energy to make bombs in World War II which were used to kill civilians of their enemies in Europe and elsewhere . . .

Respondent further elaborated on his understanding of the IRA policy concerning civilian casualities:

> Your Honor . . . there is an army record that a warning order is in force. It is a court martial offense if a warning has not been given.
> Irish Republican Army volunteers have been killed and captured going back in to take out charges that have been planted . . .

Respondent was never directly involved in the use of weapons or explosives. Respondent testified that after his arrest in Ireland, he was convicted in a Special Criminal Court used to try

IRA offenses. He was sentenced to six years in prison.

Respondent also testified about the circumstances surrounding his escape from prison. He explained that the escape was politically motivated and that he was "ordered" to participate by the IRA command.

Respondent further testified that the IRA encouraged him to leave Ireland in the wake of reports from his family and subsequently from a member of the IRA intelligence staff that his life was in danger: "that if I were killed it would solve a lot of questions."

After the hearing Judge Hupp asked Respondent where he would live if permitted to remain in the United States. The Judge also asked him about his prospects for employment in the United States. The Judge also advised him that after three years residence in the United States Respondent could "become a naturalized citizen . . ."

When the INS sought to introduce a report prepared by the Alcohol, Tobacco and Firearms Bureau, Department of Treasury, regarding the substances listed in Respondent's Irish conviction records, Judge Hupp indicated that this report was irrelevant to the adjustment application and declined to accept it into evidence: "I don't think that I have to go into that. It has no bearing on his eligibility to adjustment. We have belabored the point about the bombs and mortars and I see no point in belaboring it any further."

Judge Hupp stated that he felt that no additional evidence was needed regarding Respondent's activities and convictions in Ireland: "I have now heard enough of what happened in Ireland. I

am [now] interested in what happended in the United States." The Immigration Judge viewed the case as closed, other than allowing the INS to take two depositions of witnesses they offered to present and to send the transcripts to the Immigration Court.

The scenario presented at the end of the hearing on May 20, 1981, was greatly altered by unanticipated intervening events. As is described in detail in section III, infra, on May 22, 1981, two days after concluding Respondent's hearing, Judge Hupp was followed home for more than 120 miles by two INS agents in civilian clothes. For two weeks Judge Hupp was left to believe that IRA sympathizers -- possibly out to kill him -- were responsible for following him. Judge Hupp informed INS and the Chief Immigration Judge (the latter assumedly did not know who had actually followed Judge Hupp) that he was withdrawing from the case because of his fear for his and his wife's lives. INS waited until the morning of June 5, 1981, the morning Judge Hupp had scheduled to enter his recusal order, to advise him that he had not been followed by the IRA but by INS agents.

On June 29, 1981, the proceedings were reconvened before Immigration Judge F. Lyons who announced "I am taking jurisdiction." No inquiry was allowed into the matter of Judge Hupp's recusal. Judge Lyons stated -- without indicating how he knew this -- that the recusal of Judge Hupp "has absolutely nothing to do with this case." (Emphasis added).

While Respondent was denied any opportunity to review Judge Hupp's recusal during the course of his deportation hearing, the INS subsequently submitted declarations directly with the Board declaring that Judge Hupp's recusal was unrelated to the

Respondent's case. The agents actually involved in the following incident are never identified in the declarations. INS claims that Judge Hupp was followed home for approximately five hours because of an "anonymous" tip that he was leaving work early. This tip was allegedly received "on February 11, 1979," more than two years before he was followed home. An "investigator" was not assigned to the "Hupp" matter until February 1979, after the O'Rourke case was initiated. Judge Hupp was not followed home until two days after the Respondent's hearing had ended.

As Respondent argues below in seeking reconsideration, the incident which resulted in Judge Hupp's recusal should have, at a minimum, resulted in an examination of Judge Hupp's allegation that he was intentionally frightened off the case by INS agents afraid that he was about to rule in Respondent's favor. If Judge Hupp's assessment is correct, due process and Respondent's right to a fair hearing were clearly violated. Under such circumstances INS should not be allowed to simply sail forward with the hearing and a new Immigration Judge more inclined to rule in INS's favor. At a bare minimum, the Respondent's hearing should have started over again before a new Immigration Judge. Anything less simply rewards INS for potentially gross -- if not criminal -- misconduct.

On July 12, 1982, Judge Lyons issued his decision, not unexpectedly in favor of INS. This Board issued a decision on May 24, 1983, dismissing Respondent's appeal. On February 21, 1984, the Court of Appeals for the Second Circuit issued a decision denying Respondent's appeal. A stay of the order of deportation was granted to provide Respondent an opportunity to file a

Petition for Certiorari in the United States Supreme Court. That Petition was filed on April 2, 1984, and remains pending before the Court.

III

Review of New Evidence Justifying Reopening

Motions to reopen may be granted when the Respondent presents new evidence, material to an adjudication of his case, and not reasonably available at the time of the initial deportation hearing. Ballenilla-Gonzalez v. INS, 546 F.2d 515 (2d Cir. 1976). The Respondent must establish the prima facie materiality of the new evidence obtained and how it might change the outcome of the case. Matter of Garcia, 16 IN 653 (1978); Matter of Pattel, 16 IN 600 (1978).

This Board certainly has the discretionary power to remand a case to the Immigration Court for further proceedings and remedial action upon the finding of a prima facie showing of prejudicial government misconduct (see discussion infra). Respondent herein requests such a remand and suggests that the appropriate remedial action might involve anything from dismissal of the deportation proceedings to requiring that a new and complete hearing be held before an Immigration Judge. Even though this Board's review of deportation orders and applications for discretionary relief might be de novo in nature, it is also true that the Board has the power to remedy fundamentally unfair deportation proceedings, and might not have denied Respondent's applications for discretionary relief had Judge Hupp -- in the first instance -- granted such

applications.

On May 26, 1981, Judge Hupp wrote a memorandum to Doris Meissner, Acting Deputy Commissioner of INS, stating in relevant part:

> This report is written in order to bring to your attention what I call a very disturbing, frightening, upsetting act against me on Friday, May 22, 1981.
>
> It should be noted that I observed being followed by a black two-door . . . automobile with two white males in it . . . I observed this vehicle behind me as I turned west on Route 322 from Route 95 south and again noticed this same vehicle [behind me] south on Route 1 . . . At approximately 1:15p.m. we both [Hupp and another person] stopped for lunch . . . We then proceeded south on Route one until we turned west on a raod to Fork, Maryland which is a very narrow, winding raod and stopped for a few minutes near the Gunpowder State Park building to stretch our legs. After continuing on this raod we merged onto Belair Road in Baltimore, Maryland and traveled south on this road until turning right onto Route 695. I noticed when I turned on to Route 695 this same black two-door automobile with the same two men directly behind my car . . . I continued south on 695 and noted this same vehicle was still following me when I arrived at Route 3 turn-off south. I made a turn into the turn-off and noticed this same vehicle was still following me.
>
> I became very scared for my life because I felt these men may mean harm for me and may be sympathizers of the Irish Republican Army trying to intimidate me in reaching a decision on Michael O'Rourke . . .
>
> While proceeding south on Route 3, I decided to go into a Save-On gasoline station, north of the Millersville Police Station . . . I again observed this same car with the same men parked on an access road outside the gasoline station . . . Upon proceeding north I looked in my rear view mirror and again saw these men still following me . . . I turned [into] . . . McDonalds. They swerved then to make the righthand turn . . . [and] waited for me to come out. I decided then the next stop would be the police station . . .
>
> I drove . . . to the police station with this same vehicle still following me. I parked my car and went over and spoke to an Anne Arundel County police officer, identified myself and explained I stopped because a car had followed me on the way from Philadelphia and pointed the car out to him. At that moment, they realized they were being singled out and sped out of the police station road. I made a report at the Millersville Police Station and two plainclothes police detectives

> pursued the car . . . The officer at the desk called the local FBI office and said that an agent would interview me at my home.
>
> I then proceeded to my home and awaited the arrival of the FBI agent who upon arrival identified himself as John A. Friel, Jr. I related to him what had happened and that I was fearful for my life and fearful of my wife's life and fearful that my home could be bombed . . .
>
> I trust that all necessary and proper precautions and actions will be taken and this matter will be fully investigated and that I will be informed of the outcome. I have been to the office of my family physician . . . and am under his care at the present time.

See Exhibit A, attached hereto and incorporated by this reference. Copies of Judge Hupp's memorandum were sent to the Chief Immigration Judge, the FBI, and Lyle Karn, INS District Director in Philadelphia. Judge Hupp's memorandum was obtained by Respondent from INS through the Freedom of Information Act.

It can reasonably be concluded from Judge Hupp's memorandum that the persons following him made themselves quite obvious to him. They do not seem to have been involved in a clandestine investigation concerning when Judge Hupp left work (or whether he was leaving work early without authorization). If the "investigation" of Judge Hupp was initiated on the basis of an "anonymous" tip that he was leaving work early -- as claimed by INS -- it is unreasonable to assume that the "investigators" would follow Judge Hupp for over 120 miles after he left work. It should also be noted that INS has never produced the written anonymous tip which allegedly gave rise to the "investigation" of Judge Ernest Hupp.

It might also be noted that Judge Hupp stated in his formal recusal notice that the "anonymous" tip was completely false (if it existed at all), and that no action was ever taken against

Judge Hupp other than following him home for about five hours.

Counsel for Respondent has not been able to directly communicate with Judge Hupp because he has been ordered not to discuss the following incident under pain of "administrative action." However, Senator Arlen Specter recently spoke with Judge Hupp in relationship to a Congressional investigation into the following incident and Judge Hupp's subsequent recusal. According to Senator Specter, Judge Hupp told him that "the INS investigators based their following him on one anonymous hand-written letter and nothing more." See Exhibit B. Judge Hupp believes that the claim of an anonymous tip is an INS "cover up." Ibid.

Chief Judge Monsanto expressed "surprise" at the INS action "and said that any such matter should have been referred to" himself. Ibid.

Immediately after the following incident, and long before Judge Hupp entered his recusal order, he found that "the O'Rourke files had been removed from Judge Hupp's office by a clerk who reported to the District Director of INS, rather than any judicial officer." Ibid. (Emphasis added).

Congressman Borski advised Senator Specter "that Judge Hupp said he would have granted O'Rourke's request to stay in the United States." Ibid. (Emphasis added). Senator Specter asked Judge Hupp about his intended ruling and the Judge advised him "that based on the record before him there was nothing in the record to preclude Judge Hupp from giving O'Rourke an adjustment of status as a matter of administrative grace." (Emphasis added). Ibid.

In a letter addressed to Senator Alan Simpson, Chairman of the Senate Immigration Subcommittee, dated April 13, 1984, Senator Specter states that based upon his review of a partial Justice Department file shown to him on the matter of the Judge Hupp incident, "I continue to believe that a hearing should be held by the Judiciary Committee or a Subcommittee on the issue of the INS following of Judge Hupp and Judge Hupp's later recusal." See Exhibit C, attached hereto and incorporated by this reference.

A letter written by Congressman Robert Borski to Congressman Peter Rodino dated February 9, 1984, states in relevant part:

> Today I had a phone conversation with Judge Hupp.
> He told me that at the time he withdrew [from the Respondent's case], he was prepared to rule in Mr. O'Rourke's favor based on his marriage to an American citizen and the fact he hadn't committed any crimes in this country. He further said that [he believed] Mr. O'Rourke's actions in Ireland were political.
> He told me that he was forced off the case because he was prepared to rule in Mr. O'Rourke's favor. he believed that is why he was followed by the two INS agents.
> He further told me that he withdrew from the case before he knew that the two men following him were INS agents. At the time he withdrew he could not concieve that the men following him could be government agents because he was a judge . . .
> He said that he was absolutely intimidated by being followed. He said that at that time, John McCollough (a Philadelphia union official) had been killed in a bombing, and he was scared his life was in danger. He felt threatened . . .
> He said that he withdrew from the case believing that Mr. O'Rourke should not be deported.

See, Exhibit D, attached hereto and incorporated by this reference.

It may be reasonably assumed that Congressman Borski's letter accurately reflects his conversation with Immigration Judge Hupp. The letter establishes prima facie evidence that (1) Judge Hupp

intended to rule in favor of Respondent, (2) Judge Hupp withdrew from Respondent's case before being made aware that INS agents rather than IRA supporters followed him on May 22, 1981, (3) the following incident caused Judge Hupp to become fearful for his life, and (4) Judge Hupp believes that he was forced off Respondent's case because he was "prepared" to rule in Respondent's favor.

Suspicion about government misconduct in the Judge Hupp incident is heightened by the fact that various intelligence agencies were aware that Judge Hupp had concluded the hearing and only depositions remained to be taken in the case. For example, a Secret Service memorandum dated May 22, 1981, states that "depositions will be taken in Washington, D.C. during the first week in June 1981. Depositions will be taken for continuation of deportation proceedings against the subject." See, Exhibit E, attached hereto and incorporated by this reference. It is interesting to note that while Judge Hupp had indicated that the hearing had ended but for the depositions, the Secret Service (correctly) stated that the matter would be continued. Ibid.

An undated document obtained from the Secret Service under the Freedom of Information Act states that Judge Hupp "removed himself from a deportation case because he feared he was being stalked by assassins. But, government officials say he was actually followed by federal agents . . ." See, Exhibit F, attached hereto and incorporated by this reference. This memorandum establishes that Judge Hupp withdrew from Respondent's case before being informed that government agents -- rather than IRA supporters -- followed him on May 22, 1981. At the time Judge

Hupp withdrew, he thought he had been "stalked by assassins . . ." Ibid. If nothing else INS should have fully informed Judge Hupp about who really followed him before he "removed himself" from Respondent's case.

Documents received under the Freedom of Information Act from the U.S. Secret Service indicate direct involvement by their agency and the FBI in Respondent's case. The Secret Service has refused to disclose much of the information sought on Respondent's case. See e.g., Exhibits G and H, attached hereto and incorporated by this reference.

It should be noted that Respondent's Freedom of Information Act request resulted in the disclosure of only a handful of documents and each agency from which documents were sought -- including INS, the FBI and the Secret Service -- withheld numerous documents on the grounds of interfering with an on-going investigation, divulging the identity of confidential sources, and other exemptions under 5 U.S.C. Section 552(b). Respondent has filed a district court action in the District of New York entitled O'Rourke, et al. v. Department of Justice, et al., No. 83-Civ-5142(RJW), and anticipates the release of additional documents through this litigation.

(ii) Agency Prejudgment of Respondent's Case

Evidence of agency prejudgment of Respondent's case is provided in a memorandum dated February 11, 1980, written to the "SAIC Intelligence Division" stating: "[I]t is expected that [Respondent] . . . will atempt to claim 'asylum in the United States' . . . [INS] will fight O'Rourke's attempts on the 'asylum

issue' . . ." See Exhibit I, attached hereto and incorporated by this reference.

Another memorandum obtained under the Freedom of Information Act from the Secret Service dated February 12, 1980, states that "O'Rourke would request political asylum in the United States . . . [and] the government would contest any asylum request made by O'Rourke." See Exhibit J, attached hereto and incorporated by this reference. Clearly the United States Government had decided that it would contest Respondent's political asylum application long before it was ever filed with INS.

(iii) Penetration of Attorney-Client Relationship

A Secret Service memorandum dated November 30, 1979, obtained under the Freedom of Information Act, gives an indication that Respondent's attorney-client relationship may have been penetrated by Government agents so that they were aware of legal actions which he intended to take before actually taken. For example, the November 30, 1979, memorandum states: "O'Rourke's defense against deportation is currently based on the premise [that] the government arrest warrant is illegal. If this does not work, additional technicalities will be proposed to stall the deportation with claiming political asylum as the last resort." See Exhibit K, attached hereto and incorporated by this reference. The wording of this memorandum clearly suggests that Government agencies were aware of what Respondent intended to do before he had ever done it in his deportation hearing, and even what would be done as a "last resort."

A letter received by Respondent's counsel concerning his

Freedom of Information Act request made to the U.S. Secret Service states that certain information sought would not be released to protect "the identity of a confidential source . . ." See, Exhibit L, attached hereto and incorporated by this reference.

(iv) INS Publicizing Misinformation about Respondent

Through the Freedom of Information Act Respondent has also obtained a December 5, 1979, letter written by INS Assistant Commissioner for Investigations Glenn A. Bertness, addressed to Mr. Francis Cannon, falsely and maliciously stating, in part, that Respondent "is presently wanted by Irish authorities for escape from prison and for the subsequent murders of a British Ambassador and a police officer." See Exhibit M, attached hereto and incorporated by this reference. Testimony at Respondent's deportation hearing, including the tesimony of an Irish police officer called by INS, confirmed that Respondent is only wanted in Ireland to complete his original 6-year sentence and for his escape from prison. INS has at all times known that Respondent is not wanted in Ireland for any murders or other lesser acts of violence.

On March 16, 1983, INS Chief Legal Officer Richard J. Sharkey wrote a letter to James Delany falsely and maliciously stating, in part, that Respondent "killed a prison guard" in Ireland. See Exhibit N attached hereto and incorporated by this reference. INS knows that Respondent never killed a prison guard in Ireland.

IV.

INS Misconduct Should Result In Remedial Action

Respondent respectfully requests reopening and reconsideration on the basis that the documents he has recently come into possession of establish with sufficient credibility the possibility that gross government misconduct deprived him of a fair deportation hearing as required by the United States Constitution's Fifth Amendment due process clause. Yamataya v. Fisher, 189 U.S. 86 (1903); Ng Fung Ho v. White, 259 U.S. 276 (1922); Bridges v. Wixon, 362 U.S. 135 (1945); Sung v. McGrath, 339 U.S. 33 (1950); Accardi v. Shaughnessy, 347 U.S. 260 (1954). Upon the level of showing made in this case, where the Immigration Judge himself believes that he was intimidated off a case by INS agents, a Respondent should be entitled to an evidentiary hearing of some sort into the issue of possible government gross misconduct. In the event that such misconduct is found to have existed, some type of remedial action must be taken to preserve Respondent's right to a "fair" hearing. Perhaps such a remedy would involve recision of Judge Hupp's recusal, or the intiation of a new deportation hearing, or the dismissal of the Order to Show Cause (leaving INS free to reinitiate a new OSC). However, it is inconceivable that a federal agency could force an administrative law judge off a case by making him fear for his life and then simply sail forward to complete the hearing before a newly assigned judge! Under this approach had INS believed that Judge Lyons would rule in favor of Respondent, they could have simply frightened him off the case and got a third judge, and so on and so on. The Respondent's due process rights and the integrity of the Immigration Court must require something more

than a mere replacement of the removed judge.

The Board of Immigration Appeals and federal courts have repeatedly reversed deportation orders where serious government misconduct was shown. U.S. ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 267 (1954); Benitez-Mendez v. INS, 707 F.2d 1107 (9th Cir. 1983); Lopex-Mendoza v. INS, 705 F.2d 1059 (9th Cir. 1973); Navia-Duran v. INS, 568 F.2d 803 (1st Cir. 1977); Cheung v. INS, 418 F.2d 460 (D.C. Cir. 1969): Matter of Garcia-Flores, Interim Decision No. 2780 (BIA 1980).

In Navia-Duran v. INS, supra, the Court of Appeals held that due process woiuld be violated were INS permitted to use a coerced statement as evidence to establish deportability. 568 F.2d at 810. The Court found a "picture . . . of an over-zealous immigration agent seeking to intimidate an alien in order to effectuate deportation without . . . procedural niceties . . ." 568 F.2d at 210. If intimidation of an alien by an INS agent requires reversal of the deportation order and a new hearing without the use of statements improperly obtained, certainly intimidation of the Immigration Judge must also invoke remedial action under the Fifth Amendment's due process clause.

Mr. Justice Brandeis noted that deportation often involves the loss of "all that makes life worth living . . ." Ng Fung Ho v. White, 259 U.S. 284 (1922). Deportation "visits a great hardship on the individual . . ." Bridges v. Wixon, 362 U.S. 135, 136 (1945). The Supreme Court has commanded that "[m]eticulous care must be exercised lest the procedure by which [the respondent] is deprived of [Fifth Amendment due process] liberty not meet the essential standards of fairness." 326 U.S. at 154.

This Board must set aside its inevitable prejudices about the nature of Respondent's activities as an engineer for the IRA, and objectively consider whether to allow the apparant INS gross interference with the integrity of the Immigration Court go unexamined and unremedied in this case. It is not Constitutionally sufficient to state that this Board's de novo review power (over the merits of Respondent's case) wipes out the government misconduct at hand.

Had Judge Ernest Hupp been immediately told that he was not being "stalked by assassins" but rather "followed" by INS agents, he would not have withdrawn from the case. Had Judge Hupp not recused himself from the case, he obviously intended to grant Respondent's applications for discretionary relief. It is also clear that Respondent has not been determined to be statutorily ineligible for relief from deportation; this Board's earlier decision makes clear that relief is denied on discretionary grounds.

Had Judge Hupp granted discretionary relief, this Board might well not have overruled that decision. See e.g., Matter of T, 7 IN 417 (BIA 1957); Finucane, Procedure Before the Board of Immigration Appeals, 31 Intel Rel. 30 (1954) (If the case presents an issue as to the credibility of witnesses, due onsideration is always given to the conclusions reached by the Special Inquiry Officer who had the witness before him . . ."") While the Board has the power to conduct a de novo review of the record, it will certainly take into account that the immigration judge is the primary trier of fact with a better opportunity to assess credibility, and "ordinarily will not alter his factual

determinations." Gordon and Rosenfield, Immigration Law and Procedure, Section 1.10(e), page 1-77 (1981). Where defects in proof or procedure are found to exist, the Board has remanded cases to remedy the deficieny. See e.g., Matter of P, 9 IN 368 (BIA 1961); See also, Tandaric v. Robinson, 257 F.2d 895 (7th Cir. 1958). The Board may direct that the deportation case be reopened "for a limited purpose, e.g., developing evidence on a specific issue." Immigration Law and Procedure, supra, at page 1-79. Or it may order that "a completely new hearing be conducted . . ." Ibid.

Respondent timely sought and continues to seek the opportunity to obtain and present evidence (including perhaps administrative discovery under 8 C.F.R. Section 287.4), and to cross-examine the government's affiants regarding the Judge Hupp incident.

The INS should not be permitted to rely on ex parte declarations proclaiming the absence of wrong-doing and submitted directly to the Board of Immigration Appeals following the close of the administrative record.

V.

Conclusion

For all of the reasons stated above, Respondent respectfully moves this Board for an Order reopening and reconsidering his deportation hearing and remanding the matter for further proceedings in accordance with the due process clause of the Fifth Amendment to the United States Constitution.

Dated: June 6, 1984

Respectfully Submitted,

Peter A. Schey

Peter A. Schey
Counsel for Respondent

Memorandum

RECEIVED
INS
1981 MAY 29 AM 11:45
DISTRICT OFFICE
PHILADELPHIA, PA.

Subject	Date
Report of Unusual Incident on May 22, 1981	May 26, 1981

To Doris Meissner
Acting Deputy Commissioner
Central Office

From Ernest H. Hupp
Immigration Judge
Philadelphia, Pa.

This report is written in order to bring to your attention what I call a very disturbing, frightening, upsetting act against me on Friday, May 22, 1981.

It should be noted that I observed being followed by a black two-door, possibly 1981, Cougar automobile with two white males in it. The driver was clean-shaven; the passenger had a dark moustache with a clean-shaven portion under his nose. I observed this vehicle behind me as I turned west on Route 322 from Route 95 south and again noticed this same vehicle with the same two passengers following me south on Route 1. It should be noted that I was following another vehicle driven by a friend of mine, Fred Florenz, Jr., from Baltimore, Maryland and was using his itinerary at his suggestion. At approximately 1:15 p.m. we both stopped for lunch at Perkey's Restaurant on an intersecting road which is on a route going to Lancaster, Pennsylvania, 31 miles to the north of where we ate. We then proceeded south on Route 1 until we turned west on a road to Fork, Maryland which is a very narrow, winding road and stopped for a few minutes near the Gunpowder State Park Building to stretch our legs. After continuing on this road, we merged onto Belair Road in Baltimore, Maryland and traveled south on this road until turning right on to Route 695. I noticed when I turned on to Route 695 this same black two-door automobile with the same two men directly behind my car while proceeding on 695 beltway. Mr. Florenz made a right-hand turn at the Charles Street exit. I continued south on 695 and noted this same vehicle was still following me when I arrived at Route 3 turn-off south. I made a turn into the turn-off and noticed this same vehicle was still following me.

I became very scared for my life because I felt these men may mean harm for me and may be sympathizers of the Irish Republican Army trying to intimidate me in reaching a decision on Michael O'Rourke (aka: Patrick Mannon). I am hearing this case in New York City having been there on Wednesday, May 20, 1981, leaving Prospect Park at 6 a.m. proceeding to New York City and returning that evening at 10:30 p.m.

SERVICE
MAY 29, 2 20
DISTRICT
OFFICE

Exhibit "A"

To	Act	Inf
DD		✓
DDD		
DEP		
IB		
RAI		
CHT		
TC		
TA		
IJ		
PHT		
FROM:		
DATE:		

While proceeding south on Route 3, I decided to go into a Save-On gasoline station, north of the Millersville Police Station, and fill my tank with gasoline. I again observed this same car with the same men parked on an access road outside of the gasoline station. I then decided not to proceed home but to go north on Route 3 to McDonald's, approximately ½ mile north of the gasoline station. Upon proceeding north I looked in my mirror and saw these men still following me on Old Mill Road. I turned to the right and then a quick left turning into McDonald's. They swerved then to make the righthand turn into a BP station, made a 360° turn and waited inside. The men waited for me to come out. I decided then the next stop would be the police station.

I drove on Old Mill Road, then on RT. 3 south ~~lane~~, and when I reached the turn-off into the police station I made a left and went to the police station with this same vehicle still following me. I parked my car and went over and spoke to an Anne Arundel County police officer, identified myself and explained I stopped because a car had followed me on the way from Philadelphia and pointed the car out to him. At that moment, they realized they were being singled out and sped out of the police station road. I made a report at the Millersville Police Station and two plainclothes police detectives pursued the car with a Pennsylvania tag on the rear bumper. The officer at the desk called the local FBI office and said that an agent would interview me at my home.

I then proceeded to my home and awaited the arrival of the FBI agent who upon arrival identified himself as John A. Friel, Jr. I related to him what had happened and that I was fearful of my life and fearful of my wife's life and fearful that my home could be bombed if these were in fact Irish Republican Army agents or sympathizers trying to influence my decision in the O'Rourke case. Special Agent Friel advised that teletypes would be sent to the Philadelphia and New York City offices relating this matter.

I do not feel that I can work in the U.S. Courthouse in Philadelphia until the O'Rourke case is decided because I feel that I would just be placing my person in jeopardy by going to Philadelphia where possible harm awaits me.

I trust that all necessary and proper precautions and actions will be taken and this matter will be fully investigated and that I will be informed of the outcome. I have been to the office of my family physician, Dr. Edward S. Kallins in Baltimore, and am under his care at the present time.

Ernest H. Huff

cc: Joseph W. Monsanto, Chief Immigration Judge
Lyle L. Karn, DD, PHI
FBI Agent John A. Friel, Jr.

ARLEN SPECTER
PENNSYLVANIA

COMMITTEES:
JUDICIARY
APPROPRIATIONS
VETERANS' AFFAIRS

United States Senate

WASHINGTON, D.C. 20510

March 30, 1984

The Honorable Strom Thurmond
United States Senate
Washington, D. C. 20510

Dear Strom:

Following the conversation among you, Senator Simpson and me yesterday, I called Judge Hupp and learned some things of importance which I want to call to your attention.

Judge Hupp said that the INS investigators based their following him on one anonymous hand-written letter and nothing more. Judge Hupp said that he thought that allegation sounded like a "cover up."

When the INS agents followed Judge Hupp from Philadelphia to Maryland, he was so frightened that he drove into a police station. At that point, the INS agents drove away in a hurry without identifying themselves when a policeman came upon the scene.

Judge Hupp further said that his supervisor, Judge Monsanto, expressed surprise at the INS action and said that any such matter should have been referred to Judge Monsanto.

The following occurred in May 1981 on the Friday before Memorial Day. Judge Hupp filed a Memorandum recusing himself the following Tuesday. When he returned to his office the next Monday (he took off the week because he was ill), all of the O'Rourke files had been removed from Judge Hupp's office by a clerk who reported to the District Director of INS, rather than any judicial officer.

Judge Hupp advised that there was never any hearing in the judicial proceedings on O'Rourke's claim that O'Rourke had been denied due process of law. There was no testimony before the Board of Immigration Appeals, and there was no lower court proceeding. Accordingly, there appears to have been no evidentiary base for the Second Circuit summary one sentence conclusion that "Petitioner's due process claims arising out of Judge Hupp's decision to recuse himself are so lacking in substance as to merit no discussion."

As I mentioned to you yesterday, Congressman Borski (in whose Congressional District Mrs. O'Rourke lives) told me that Judge Hupp said he would have granted O'Rourke's request to stay in the United States. I asked Judge Hupp about that, and he said that based on the record before him there was nothing

in the record to preclude Judge Hupp from giving O'Rourke an adjustment of status as a matter of administrative grace.

I am pursuing the matter by obtaining all of the records available from Senator Simpson and any other source where I can obtain any further factual information.

It is my request that the Committee proceed to have a hearing on the issue of Judge Hupp's recusal because:

1. The extraordinary event of INS agents following the Judge from Pennsylvania to Maryland based on one anonymous letter.

2. Judge Hupp's stated fear that he was about to be assassinated which led him to recuse himself.

3. The failure of the INS agents to identify themselves, but instead left the scene, after Judge Hupp found a policeman.

4. The extraordinarily fast removal of the O'Rourke papers from Judge Hupp's office by an INS clerk.

5. Judge Hupps' statement that he is not a golfer, that there was no reason for INS agents to suspect him of dereliction and Judge Hupp's characterization of the hand written anonymous letter as a "cover up."

While it is true that Mrs. O'Rourke is a constituent from Pennsylvania, it is my strong view that our Committee has a responsibility to look into this matter under our oversight function, especially in the context where the Department of Justice and INS have stonewalled my repeated efforts to get to the underlying facts.

Beyond our supervisory function, if INS follows a Judge on this state of the record, then the independence of the judiciary is being severely undermined and the Congress should legislate on this subject if a hearing confirms the findings of this very preliminary inquiry.

Sincerely,

Arlen Specter

AS:jb

cc: Senator Simpson

By Hand

ARLEN SPECTER
PENNSYLVANIA

Mary Louise
741

COMMITTEES:
JUDICIARY
APPROPRIATIONS
VETERANS' AFFAIRS

United States Senate

WASHINGTON, D.C. 20510

April 13, 1984

The Honorable Alan K. Simpson
United States Senate
Washington, D. C. 20510

Dear Alan:

As I had mentioned to you at the Judiciary Committee Executive session yesterday, I think it is useful to put in writing my renewed request for a hearing on the O'Rourke case and the reasons for this request based on the current status of the O'Rourke matter.

Immediately after our discussions two weeks ago, I had a two and one-half hour meeting with representatives of the Immigration and Naturalization Service and the Department of Justice and went over the INS file. I had asked INS for a few additional pieces of information, which they have not yet provided, but in any event, those outstanding items are not critical. My investigation has gone as far as it can go without a hearing, so I regard my investigation to be concluded.

Based on my review of the INS file, I continue to believe that a hearing should be held by the Judiciary Committee or a Subcommittee on the issue of the INS following of Judge Hupp and Judge Hupp's later recusal.

At the lengthy meeting, the Department of Justice was represented by Donald Baker, Esquire, and at that time I renewed my request for the Department of Justice file. For the past ten days, we have been trying to get an answer from the Department of Justice without success.

For about a year now, I have virtually made it a career to pursue Attorney General Smith and his Department, and a number of these requests have been on behalf of the Committee (after Senator Thurmond requested that I prepare specific interrogatories) and on behalf of the Subcommittee. I do not say this lightly, but frankly, it is my view that the Attorney General and the Department of Justice have been unprofessional and insulting in their handling of this entire matter in their refusals to respond and their dilatory tactics.

In my judgment, the hearing on the O'Rourke matter should include the summoning of Attorney General Smith to deal with the question of the Department of Justice's failure to respond to the long-standing requests for information by the Judiciary Committee and me on the O'Rourke case.

Sincerely,

Arlen Specter

AS:jb

cc: Senator Strom Thurmond
Attorney Genral Smith

Exhibit "C"

By Hand

ROBERT A. BORSKI
3D DISTRICT, PENNSYLVANIA

COMMITTEES:
MERCHANT MARINE AND FISHERIES
PUBLIC WORKS AND TRANSPORTATION
SELECT COMMITTEE ON AGING

Congress of the United States
House of Representatives
Washington, D.C.

PLEASE REPLY TO:
☐ 314 CANNON BUILDING
WASHINGTON, D.C. 20515
(202) 225-6251

☐ 303 BAYLIS TIMES BUILDING
8001 ROOSEVELT BOULEVARD
PHILADELPHIA, PENNSYLVANIA 19152
(215) 338-3356

☐ 3405 KENSINGTON AVENUE
PHILADELPHIA, PENNSYLVANIA 19134
(215) 423-6962

☐ 7208 NORTH BROAD STREET
PHILADELPHIA, PENNSYLVANIA 19126
(215) 424-6430

February 9, 1984

Hon. Peter Rodino, Jr.
Chairman
Committee on the Judiciary
2137 Rayburn HOB

Dear Mr. Chairman:

I am writing to bring to your attention some very important information regarding my introduction of a private bill for Michael O'Rourke.

As you know from the previous information I have forwarded to you, Immigration Judge Ernest H. Hupp was hearing the O'Rourke case and it appeared from the statements in the court record that he was favorably inclined towards Mr. O'Rourke. Two days later, he was followed by two men in a black car for 125 miles.

Today I had a phone conversation with Judge Hupp.

He told me that at the time he withdrew, he was prepared to rule in Michael O'Rourke's favor based on his marriage to an American citizen and the fact he hadn't committed any crimes in this country. He further said that Mr. O'Rourke's actions in Ireland were political.

He told me that he was forced off the case because he was prepared to rule in Mr. O'Rourke's favor. He believes that is why he was followed by the two INS agents.

He further told me that he withdrew from the case before he knew that the two men following him were INS agents. At the time he withdrew he could not conceive that the men following him could be government agents because he was a judge. He had served the government honorably for many years and had never seen such a thing.

He said that he was absolutely intimidated by being followed. He said that at that time, John McCollough (a Philadelphia union official) had been killed in a bombing, and he was scared his life was in danger. He felt threatened.

He told me that he had been through World War II and Korea and had not been as frightened then as he had been when he was followed.

When I told him that I had introduced a private bill, he said he was in favor of granting relief to Michael O'Rourke. He said he withdrew from the case believing Mr. O'Rourke should not be deported.

This information deserves to be considered by the Immigration Subcommittee at a hearing. That is why I need your help to request a stay should the court order Mr. O'Rourke deported within the next few days.

I am enclosing a copy of the letter that I received today from Chairman Mazzoli which says that the Subcommittee will place the bill on its agenda for consideration when all appeals are exhausted.

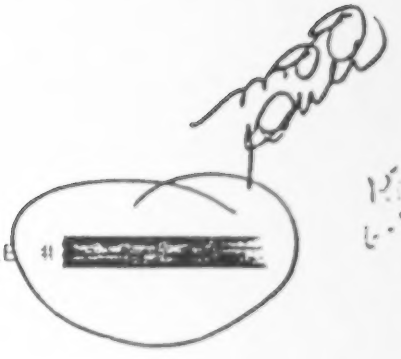
I thank you for your kind and prompt attention to this matter. If you have any questions, please do not hesitate to call me at any time.

Sincerely,

ROBERT A. BORSKI
Member of Congress

RAB:ec

(D (C



ZCZCNYC 1421EST 052281 USSSNS

ZNRUUTIHL ZZ

FM NEW YORK FIELD OFFICE FILE # [redacted]

TO HEADQUARTERS (SID/FIB)

INFO PHILADELPHIA FIELD OFFICE

SUBJECT MICHAEL ANTHONY O'ROURKE

A. INTRODUCTION:

REFERENCE IS MADE TO TWX #065 FROM NEW YORK TO INTELLIGENCE DIVISION, DATED 05/08/81, CONCERNING THE SUBJECT.

B. OTHER INVESTIGATION:

ON 05/20/81, CONTACT WAS MADE WITH METROPOLITAN CORRECTION CENTER (MCC), NEW YORK, CONCERNING THE SUBJECT. THE SUBJECT IS CURRENTLY CONFINED AT THAT FACILITY AWAITING DEPORTATION PROCEEDINGS.

ON 05/22/81, CONTACT WAS MADE WITH AUSA BELOTE, SDNY, WHO ADVISED THAT DEPOSITIONS WILL BE TAKEN IN WASHINGTON, D.C., DURING THE FIRST WEEK IN JUNE 1981. DEPOSITIONS WILL BE TAKEN FOR CONTINUATION OF DEPORTATION PROCEEDINGS AGAINST THE SUBJECT.

C. DISPOSITION:

CASE CONTINUED AT NEW YORK ON 30 DAY STATUS.

USSS NEW YORK [redacted]

Exhibit "E"

Best Copy Available

(NEW)

(NEW YORK CITY) -- A U-S IMMIGRATION COURT JUDGE FROM THE BALTIMORE AREA SAYS HE REMOVED HIMSELF FROM A DEPORTATION CASE BECAUSE HE FEARED HE WAS BEING STALKED BY ASSASINS. BUT, GOVERNMENT OFFICIALS SAY HE WAS ACTUALLY BEING FOLLOWED BY FEDERAL AGENTS.

JUDGE ERNEST HUPP SAYS THE CASE INVOLVED 28-YEAR-OLD MICHAEL O'ROURKE, A ONE-TIME BOMB SPECIALIST FOR THE I-R-A. A GOVERNMENT SPOKESMAN SAYS THE AGENTS WERE FOLLOWING JUDGE HUPP AS PART OF AN INVESTIGATION INTO A NON-CRIMINAL MATTER. BUT THE GOVERNMENT WOULD NOT ELABORATE.

Exhibit "P"

Best Copy Available

##PHL<

//IMMEDIATE//

79 NOV 1 AM : 49

FM HQS ID (FIB/EC)

TO PHILADELPHIA

SUBJECT: MICHAEL O'ROURKE

REFERENCE IS MADE TO USSS TELETYPE NUMBER 1433 DATED 10-31-79 CONCERNING THE CAPTIONED SUBJECT.

QUOTED BELOW FOR YOUR INFORMATION IS AN FBI TELETYPE RECEIVED ON 11-01-79 CONCERNING THIS SUBJECT.

QUOTE:

[redacted]

Best Copy Available

[redacted]

UNQUOTE

PHILADELPHIA IS REQUESTED TO CONTINUE THEIR INVESTIGATION

HQS ID (FIB/EC) [redacted]

662USS RECEIVED 0922EST 110179

Exhibit "G" - 2 of 2

Best Copy Available

F&B

CC SAIC
Rig'l

##PHL NYC<

//PRIORITY//

FM HEADQUARTERS (ID-FIB/EC)

FILE [redacted]

TO PHILADELPHIA
NEW YORK

SUBJECT: MICHAEL O'ROURKE

REFERENCE IS MADE TO PREVIOUS REPORTS CONCERNING THE CAPTIONED SUBJECT.

ON 12/28/79, THE FOLLOWING TELETYPE WAS RECEIVED FROM FBI AND IS QUOTED BELOW IN ITS ENTIRETY:

QUOTE

[redacted]

[redacted]

[redacted]

[redacted]

UNQUOTE

PHILADELPHIA AND NEW YORK ARE REQUESTED TO CONTINUE THEIR INVESTIGATIONS

HEADQUARTERS (ID-FIB/EC) [redacted]

012USS RECEIVED 1031EST 123179

UNITED STATES GOVERNMENT

memorandum

DATE: 02-11-80

REPLY TO ATTN OF: [redacted]

SUBJECT: Anthony Michael O'Rourke [redacted] File

2-11-80 gal (A)

TO: SAIC Intelligence Division

[redacted] New York, contacted writer and advised following re: captioned subject's latest judicial status:

AUSA Belote, New York, advised that the subject ap peared in court on 02-07-80. The subject reportedly informed judge that he is not the "subject in question." Because of this, AUSA Belote has asked for a continuance so that a "witness can be brought from Ireland, who will identify this subject."

AUSA Belote further advised SA [redacted] that it is expected that this subject, once identified by the Irish witness, will attempt to claim "asylum in the United States." Belote further advised that he will fight O'Rourke's attempts on the "asylum issue" and that this can be expected to continue in court.

Writer informed SA [redacted] at a report should be sent from NYFO detailing the above and that 30 day status should be requested until this is settled judiciously.

Exhibit "I"

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

OPTIONAL FORM NO. 10 (REV. 7-76) GSA FPMR (41 CFR) 101-11.6 5010-112

848NYC 1529EST 021280 US6661

//ROUTINE// T (03-18-80)

FM NEW YORK [redacted] file

TO ID (FIB/EC)
PHILADELPHIA

SUBJECT: MICHAEL A. O'ROURKE

SYNOPSIS

THE SUBJECT'S DEPORTATION HEARING OF 2/7/80 WAS CONTINUED PENDING THE ARRIVAL OF A WITNESS FROM IRELAND THAT COULD MAKE A POSITIVE IDENTIFICATION OF THE DEFENDANT.

CASE CONTINUED IN NEW YORK.

A. INTRODUCTION

REFERENCE IS MADE TO THE PHILADELPHIA TWX # 375, DATED 2/8/80 AND THE TELEPHONE CONVERSATION BETWEEN S[redacted]ID) AND S[redacted](NYFO) ON 2/11/80.

D. OTHER INVESTIGATIONS

ON 2/11/80, AUSA THOMAS BELOTE, CIVIL DIVISION, SDNY, TELEPHONE NUMBER (212) 791-9166 ADVISED S[redacted]T O'ROURKE'S 2/7/80 DEPORTATION HEARING HAD BEEN CONTINUED. AUSA BELOTE CONTINUED THAT NO NEW HEARING DATE HAD BEEN SET.

AUSA BELOTE FURTHER STATED THAT THE GOVERNMENT WAS ATTEMPTING TO OBTAIN A WITNESS FROM IRELAND TO POSITIVELY IDENTIFY O'ROURKE AND REFUTE HIS INTENTION THAT HE WAS NOT IN FACT THE PERSON IN QUESTION.

AUSA BELOTE CONTINUED THAT HE BELIEVED, UPON POSITIVE IDENTIFICATION O'ROURKE WOULD REQUEST ASYLUM IN THE UNITED STATES. AUSA BELOTE STATED THAT THE GOVERNMENT WOULD CONTEST ANY ASYLUM REQUEST MADE BY O'ROURKE.

ON 2/11/80, S[redacted]) WAS TELEPHONICALLY ADVISED OF THE ABOVE FINDINGS BY S[redacted]YFO).

F. DISPOSITION

CASE CONTINUED IN NEW YORK WITH A THIRTY DAY REPORT STATUS

Exhibit "J"

79 NOV 30 A11 : 46

121PHL 1003EST 113079 USS755

//PRIORITY//

FM PHILADELPHIA FILE: [redacted]

TO HEADQUARTERS (ID-FIB)
NEW YORK

SUBJECT: MICHAEL O'ROURKE

(A) INTRODUCTION:

REFERENCE PHILADELPHIA TELETYPE NO. 087 OF 11/14/79.

(D) OTHER INVESTIGATION:

ON 11/29/79 THE SUBJECT HAD AN INS HEARING AT THE FEDERAL COURTHOUSE, PHILADELPHIA, PA. HE REFUSED TO ANSWER ANY PRELIMINARY QUESTIONS INCLUDING HIS NAME, CLAIMING IT WOULD INCRIMINATE HIM. O'ROURKE'S DEFENSE AGAINST DEPORTATION IS CURRENTLY BASED ON THE PREMISE THE GOVERNMENT ARREST WARRANT IS ILLEGAL. IF THIS DOES NOT WORK, ADDITIONAL TECHNICALITIES WILL BE PROPOSED TO STALL THE DEPORTATION WITH CLAIMING POLITICAL ASYLUM AS THE LAST RESORT.

THE INS HEARING WAS THEN POSTPONED UNTIL 12/6/79. O'ROURKE WAS RETURNED TO THE METROPOLITAN CORRECTION CENTER IN NEW YORK.

(F) DISPOSITION:

CONTINUED PENDING FURTHER INS HEARINGS.

PHILADELLPHIA [redacted]

Exhibit "K"

DEPARTMENT OF THE TREASURY
UNITED STATES SECRET SERVICE

WASHINGTON, D.C. 20223

OFFICE OF THE DIRECTOR

APR 26 1983

Mr. Peter A. Schey, Esq.
NCIR, Inc.
1544 West 8th Street
Los Angeles, CA. 90017

Re: Freedom of Information Act
O'Rourke - 7236

Dear Mr. Schey:

Reference is made to your letter received March 30, 1983, appealing a decision of Mr. Hugh P. Ward, Freedom of Information Officer, United States Secret Service, denying you certain information regarding your client Michael A. O'Rourke under the Freedom of Information Act. Treasury regulations regarding administrative appeals of initial denials by the United States Secret Service vest the review authority in the Deputy Director of the Secret Service (31 Code of Federal Regulations, Subtitle A, Part 1, Appendix D and 40 Federal Register 49089, dated October 21, 1975).

The records and correspondence pertinent to your appeal have been reviewed. I have determined that the exemptions claimed by Mr. Ward in his letter of March 16, 1983 were proper. The Secret Service records contain investigatory information compiled for law enforcement purposes. Pursuant to Title 5, United States Code, Section 552, subsection (b)(7)(A), (C), (D), and (E), information is being withheld since disclosure would interfere with an ongoing enforcement proceeding, constitute an unwarranted invasion of personal privacy, disclose the identity of a confidential source, or disclose investigative techniques and procedures. Further, certain information is being withheld pursuant to subsection (b)(1) as the material is properly classified pursuant to Executive Order 12356.

In addition, pursuant to subsection (b)(5), Secret Service information is being withheld since it contains inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the Secret Service. Other deletions have been made in accordance with subsection (b)(2) as matters relating solely to internal proceedings. The above cited exemptions are not to be construed as the only exemptions which may be applicable to these documents under the Freedom of Information Act.

I have also determined that certain information may be properly disclosed to you. The documents containing that information are enclosed with this letter.

As you have been advised by Mr. Ward, Federal Bureau of Investigation documents contained within Secret Service records were not referred since you have made a direct Freedom of Information Act request to the Bureau. However, certain Federal Bureau of Investigation information contained in Secret Service documents was forwarded to the Bureau for processing and direct release to you.

Any denial on appeal is subject to judicial review in the District Court in the district where the complainant resides, has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

For the purpose of appeals of initial denials under the Freedom of Information Act, the undersigned is the official making this determination for the United States Secret Service.

Sincerely,

William R. Barton

William R. Barton
Deputy Director

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
WASHINGTON, D.C. 20536

PLEASE ADDRESS REPLY TO

AND REFER TO THIS FILE NO.

DEC 5 1979

Mr. Francis X. Cannon
24 Wilson Avenue
Chalfont, PA 18914

Dear Mr. Cannon:

This is in response to your letter of November 12, 1979, to Acting Commissioner Crosland regarding Mr. Michael O'Rourke.

Mr. O'Rourke was brought to Service attention by another agency on October 30, 1979. His identity and Irish citizenship have been established by fingerprint comparison. Evidence has been obtained that Mr. O'Rourke has been convicted in Ireland of illegal possession of explosives for which he was sentenced to serve six years in prison. He is presently wanted by Irish authorities for escape from prison and for the subsequent murders of a British Ambassador and a police officer.

This Service, the Federal Bureau of Investigation and various local police agencies have received information from confidential sources as well as threats from anonymous callers that efforts would be made to free Mr. O'Rourke by violent means. Given Mr. O'Rourke's past history of violent escape from prison authorities in Ireland these threats could not be ignored.

This Service has an obligation, which cannot be taken lightly, to prevent the escape of persons in its custody as well as provide for the protection of its employees, media representatives and members of the public who may attend its administrative hearings.

Thank you for your interest in this matter.

Sincerely,

Glenn A. Bertness

Glenn A. Bertness
Assistant Commissioner
Investigations

Exhibit "M"

PLEASE REFER TO THIS FILE NUMBER

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
ROOM 1381 — UNITED STATES COURTHOUSE
INDEPENDENCE MALL WEST
601 MARKET STREET
PHILADELPHIA, PENNSYLVANIA 19106

March 16, 1983

James A. Delaney
599 Spencer Lane
San Antonio, TX 78201

Dear Mr. Delaney:

Your letter to Attorney General Smith has been referred to this office for reply.

Mr. O'Rourke presently has an application to adjust his status to that of a permanent resident pending before the Board of Immigration Appeals in Washington, D.C. We are awaiting a decision from the Board at this time.

Mr. O'Rourke has been detained in the custody of this Service because the Free State Government alleges that, when Mr. O'Rourke broke out of prison in the Republic of Ireland, he killed a prison guard. That government wishes to try him for this incident..

The question of his detention has been presented to the U.S. District Court for the Southern District of New York. That court has sustained the action of this Service in detaining Mr. O'Rourke.

Sincerely,

FOR THE DISTRICT DIRECTOR

RICHARD J. SHARKEY
Chief Legal Officer

cc: AUSA
SDNY

Exhibit "N"

Office - Supreme Court, U.S
FILED
APR 12 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1615

In the Supreme Court of the United States

October Term, 1983

MICHAEL O'ROURKE,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITIONER'S SUPPLEMENTAL APPENDIX

PETER A. SCHEY*
MARGARET L. POPKIN
CARLOS HOLGUIN
National Center for Immigrants Rights, Inc.
256 S. Occidental Boulevard
Los Angeles, California 90057
Telephone: (213) 388-8693
Counsel of Petitioner

*Counsel of Record

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1. Decision of the Immigration Judge (July 12, 1982).....A-1

2. Decision of the Board of Immigration Appeals (May 24, 1983).....A-34

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
IMMIGRATION COURT

Date: July 12, 1982

File: A22 607 396 - New York, NY

In the Matter of:	)	
Michael O'Rourke	)	IN DEPORTATION
	)	PROCEEDINGS
-RESPONDENT-	)	
	)	

CHARGE: Order to Show Cause:

I&N Act Section 241(a)(2), 8 USC 1251(a)(2),

In the United States in violation of law, to wit: Section 291 of the Act - failure to show time, place and manner of entry.
LODGED (1); I&N Act Section 241(a)(2) -entry without inspection.
LODGED (2); - I&N Act Section 241(a)(2) -non-immigrant, visitor remained longer and
LODGED (3); - I&N Act Section 241(a)(5) 8 USC 1251(a)(5) failure to report address or change of address as required by Section 2654 of the Act.

APPLICATION:
I&N Act - Section 245 Adjustment of status to permanent resident, with waivers under I&N Act - Section 1182(h) and
I&N Act - Section 208 Political asylum and
I&N Act - Section 243(h) interdiction of deportation to the Republic of Ireland
Termination or voluntary departure.

IN BEHALF OF RESPONDENT:

Wasserman, Orlow, Ginsberg & Rubin, Esqs.
Public Ledger Building, Suite 936
6th & Chestnut Street
Philadelphia, PA

IN BEHALF OF SERVICE:

Thomas Belote, Esq.
Special Assistant U.S. Attorney
Southern District of New York
New York, NY 10007

DECISION OF THE IMMIGRATION JUDGE

The respondent is a 29 year old married male alien. He is a native and citizen of the Republic of Ireland, who last arrived in the United States on or about February 16, 1978 using the identity of one Pat Martin Mannion. He was admitted as a visitor, authorized to remain in the United States as a non-immigrant until March 9, 1978. He remained after that date without authority, as he now admits. Respondent is, therefore, deportable under the second Lodged Charge served on June 17, 1980.[1/] Respondent does not chal-

lenge that conclusion in any respect.

The record conclusively demonstrates that respondent's entry, under a false identity, and his clandestine sojourn, until the time of his apprehension by the Immigration Service were part of a wilful and deliberate pattern, which developed after his escape from prison in the Republic of Ireland. It continued at least until he was apprehended by the Immigration and Naturalization Service here in the United States. At no time during that period did the respondent ever report his true identity or place of residence in the United States. No other conclusion is possible than that his failure to report his address to the Immigration Service was the conscious and wilful act of a fugitive. There is not a scintilla of evidence presented by the respondent which would warrant a conclusion that his failure to report his address,

as required under Section 265 of the Immigration and Nationality Act, was either excusable or not wilful. Accordingly, I find that the respondent is deportable on the Third Charge lodged in the course of the hearing on June 17, 1980.2/

In view of the foregoing conclusions and events following the institution of the proceeding,4/ with the issuance of the Order to Show Cause on October 30, 1979, it is unnecessary to discuss the propriety of the charge contained in the Order to Show Cause or the second Lodged Charge, served on November 29, 1979, in which it is alleged that the respondent had not been inspected by an immigration officer. I note, in passing, that there is no evidence in the record to show thatthe respondent disclosed the time, place or manner of his entry at the time of his arrest. His acknowledgment of his

true identity and his disclosure of the facts related to his entry under an assumed false and fictitious identity did not occur until the hearing on June 19, 1980. At that time the respondent elected to pursue an application for adjustment of status on the basis of his previously undisclosed marriage.

What I have already said effectively disposes of the question of deportability. I find, therefore, that I need not now discuss those portions of the record which deal with the government's effort to identify respondent through the introduction of extensive testimony and documentary evidence. Obviously, the production of that evidence and its relevance to the issue of deportability has become significantly less important to the disposition of the entire case. It is no longer critical to the issue of deportability. The proceedings have seen the respondent

transformed from a person suggesting that he may have been unjustly accused to that of an alien applying for a variety of discretionary benefits, which might entitle him to remain in the United States in one status or another. They will be considered seriatim.

I. THE APPLICATION FOR ADJUSTMENT OF STATUS

Respondent applied for adjustment of status on June 19, 1980 under Section 245 (Exhibit 33.) He claims visa availability based on the approval of a visa petition, filed on his behalf on June 19, 1980, and approved by the Board of Immigration Appeals on April 30, 1981. The application for adjustment was accompanied by an application for a waiver of grounds of excludability under Section 212(h) and 212(i) of the Act, 8 USC 1182(i). (Exhibit 33(g)). The application for a waiver of inadmissibility under

Section 212(h) is sought to overcome excludability because of the respondent's conviction under certain provisions of the criminal laws of the Republic of Ireland. Respondent notes: "Upon this record of criminal convictions it is believed that the respondent may be facially excludable pursuant to Sections 212(a)(9) and (10).[5/]"

The application for waivers of grounds of inadmissibility also cites Section 212(a)19) as a possible ground of inadmissibility. Section 212(i) provides for the waiver of excludability grounded in misrepresentation or fraud in procuring a visa, under Section 212(a)(19).

Each of the three applications made involve the issue of whether or not the crimes for which the applicant was convicted are "purely political offenses" as that term is used in Section 212(a)(9) and (10) of the Act. At this stage of my

decision I will first deal with the discretionary applications which are now pending before me. Those are the applications for adjustment of status and the concurrent applications for waivers of First: inadmissibility by reason of criminal convictions under Section 212(a)(9) & (10), and Second: inadmissibility under Section 212(a)(19) by reason of misrepresentations in connection with the procurement, issuance and use of the non-immigrant visa with which the respondent entered the United States. Assuming waivers, under Section 212(h) or 212(i), are required respondent must show eligibility for those waivers before adjustment under Section 245 can be granted, even if he otherwise merited a grant of relief.

II THE APPLICATION UNDER SECTION 212(h)

In order to qualify for a waiver of inadmissibility under Section 212(h) respondent must establish statutory eligi-

bility before the favorable exercise of discretion need be reached. In this case, to establish his eligibility under the statute, he must first show that he is the spouse of a United States citizen. This the respondent has done by satisfying the Board of Immigration Appeals that his visa petition as the spouse of a citizen should be approved. In reaching my decision concerning respondent's eligibility for Section 212(h). I will assume that the Board's decision with regard to the bona fides of the marriage is correct. In doing so I pass over any doubts which might be engendered by the belated disclosure of the marriage and the extremely limited publicity given to the existence of the union prior to this proceeding.

However, the respondent must show more than the existence of the relationship of husband and wife. He must show

that his exclusion from the United States, by reason of his criminal convictions would result in extreme hardship to his wife. This the respondent has not done. The respondent's marriage was not an open one. There is no evidence that the parties ever lived together in a common household. Indeed, there is no claim that they established their own home during the brief period between the claimed marriage in July, 1979 and the respondent's arrest at the end of October of that year. His wife continued to live with her parents and he continued to occupy his own quarters. Respondent shows no gainful employment in the United States at any time. Respondent's wife has been employed both before and after his arrest. She has always been self-supporting and she continues to be so today. At the time of the claimed marriage the respondents's wife was aware

of the fact that he was a fugitive from justice who had escaped from prison in the Republic of Ireland. She could not have had any reasonable expectation that he would not be detected as an alien unlawfully in the United States. If that were to happen, the couple should certainly have considered the very real risk that he might be required to leave the United States and, possibly, return to the Republic of Ireland. Indeed, in the absence of an extraordinarily sophisticated analysis of the Immigration Law, and all of its ramifications as well, the intending wife could not have anticipated the variety of applications for relief from deportation made here. I doubt that the ordinary layman would have thought that a person similarly situated could remain in the United States without regard to a prior criminal record and fugitive status.

Obviously, if the respondent is required to leave the United States, the wife will be deprived of his companionship, but that is an incident of any separation of husband and wife. Except for that factor there is no demonstrated hardship to the citizen spouse in this case. In reaching that conclusion I do not in any way denigrate the devotion of the respondent and his wife to one another.

III THE APPLICATION UNDER SECTION 212(i)

Respondent also seeks a waiver of inadmissibility under Section 212(i) as an alien who procured a visa or other documentation or entry into the United States by fraud or misrepresentation. In this instance the respondent procured a visa under the name of Pat Martin Mannion for the purpose of travelling from the Republic of Ireland into the United States. He secured his admission through

the use of that fraudulent identity and misrepresentation. Section 212(i) provides that an alien inadmissible under Section 212(a)(19) may be admitted to the United States for permanent residence, if otherwise admissible, if the Attorney General in his discretion has consented to the respondent's applying for a visa and admission to the United States. the discretionary grant of that relief does not require that there be a finding of extreme hardship but only that the alien be the spouse of a United States citizen. Here, again, I do not question the bona fides of the relationship between the respondent and his spouse and I reach the application for a waiver of inadmissibility under Section 212(i) in the same posture as the principal application for adjustment of status. In each instance, under section 245 and under Section 212(i), the respondent establishes a

prima facie case by showing visa availability and admissibility under all of the relevant provisions of Section 212(a).

As I indicated above, questions of political offenses and serious non-political crimes are interrelated. They involve what may be complicated questions concerning the construction of those terms in the various provisions of law which are significant in this case. They, perhaps, represent the most significant aspects of this case in terms of its final determination. However, even if those questions were not present, there would remain a serious question as to whether or not this respondent's application should be granted in the exercise of discretion; assuming him to be admissible; assuming that he does not fall within the exclusion provisions of Section 212(a)(9) or (10) or (19).

In any case involving an alien, who had entered the United States as a visitor and remained beyond the authorized time, an application for adjustment of status after marriage to a citizen of the United states may often be granted, in the absence of other adverse factors. However, in this case, the record discloses an alien who was a fugitive from justice in his own country, who procured a visa under a false identity; who was, in fact, seeking to escape the authorities of his own country. After entering the United States under a false identity, he continued to remain here clandestinely until apprehended by the Immigration Service. He did not seek asylum or sanctuary under his own name until it served his purpose to do so. He was never a bona fide visitor. He has no ties in the United States other than his wife, who was at all times privy to the

illegal status of her husband in the country and his criminal background. Accordingly, even if he were not inadmissible under Section 212(a)(9) of (10) because of the claimed political nature of his criminal activities, his immigration record involving conscious, wilful deception and fraud would argue against any discretionary grant of the extraordinary relief of adjustment of status and the special consent of the attorney general required under Section 212(i). On that basis the record does not justify a grant of adjustment of status under Section 245. That conclusion stands on its own without reaching the perhaps complicated question of Celtic-Anglo-American relations and political crimes to which I now turn.

IV THE CRIMES

The crimes for which the respondent was convicted and for which he seeks a

waiver of inadmissibility are those described in Certificates of Conviction which are in evidence. (Exhibits 14 and 14A).

The first Certificate (Exhibit 14) relates to convictions before a Special Criminal Court held at Dublin on July 7, 1975 of Michael O'Rourke on two counts, Count No. 2 for possession of explosives substance under suspicious circumstances (Section 4 of the Explosive Substances Act) and Count 4 for unlawfully and maliciously having in his possession firearms with intent to enable any other person by means of such firearms to endanger life. (Section 15(b) of the Firearms Act of 1925, as amended by the Firearms Act of 1964 and 1971). [Emphasis Supplied]

The second Certificate (Exhibit 14a) convictions before a Special Criminal Court held at Dublin on July 9, 1975 of

Michael O'Rourke on three counts. Count No. 3 charged a violation of Section 15 of the firearms act, possession of ammunition to enable any other person by means of such ammunition to endanger life. Count No. 6 charged unauthorized possession of ammunition without a Certificate issued under the firearms Act of 1925/1971.

Count 7 charged possession of an explosive substance under suspicious circumstances in violation of the Explosive Substances Act of 1883.

The Certificates of Conviction are supplemented by the records furnished by the respondent and identified by him in the hearing on October 22, 1981 (Exhibit 43).

The record also includes copies of relevant portions of the statutes, defining the crimes for which those convictions were had. Exhibit 62, placed

in evidence on March 22, 1982 includes parts of the Law relating to Explosive Substances [April 10, 1883] and the Firearms Act of 1925.

V EXCLUDABILITY - Section 212(a)(9)

Section 4 of the Explosive Substances Act provides:

> Any person who makes or knowingly has in his control any explosive substance, under such circumstances as to give rise to a reasonable suspicion that he is making it or does not have it in his possession or under his control for a lawful object shall unless he can show that he made it or had it in his possession or under his control for a lawful object, be guilty of felony, and, on conviction, shall be liable to penal servitude for a term not exceeding fourteen years, or to imprisonment for a term not exceeding two years with or without hard labour, and the explosive substance shall be forfeited.

Section 15 of the Firearms Act of 1925 provides:

> Any person who after the passing of this Act has in his possession or under his control any firearms or ammunition -
> (a) with intent to endanger life or cause serious injury to property, or

(b) with intent to enable any other person by means of such firearms or ammunition to endanger life or cause serious injury to property, shall, whether any injury to person or property has or has not been caused thereby, be guilty of felony, and on conviction therof shall be liable to suffer penal servitude for a term not exceeding twenty years, or imprisonment with or without hard labour for a term not exceeding two years, and the firearm or ammunition aforesaid shall be forfeited.

Whether Section 4 of the Explosive Substances Act, standing alone, defines a Crime involving moral turpitude may be open to question. However, no such doubt is engendered by the provisions of Section 15 of the Firearms Act. There the intent to endanger life or cause serious injury is spelled out as the object of the unlawful possession.

I find, therefore, that the convictions of the respondent for violations of Section 15 of the firearms Act are conviction for crimes involving moral turpitude. The respondent is, therefore, excludable under Section 212(a)(9) unless

the crimes are found to be within the "purely political offenses" exception.

VI EXCLUDABILITY Section 212(a)(10)

The first Certificate of Conviction also shows that the respondent was sentenced on July 7, 1975 to be kept in Penal Servitude for a period of six years on each of two counts; 2 and 6. The second Certificate shows his sentence to penal servitude for six years on Counts 3 and 7 and 2 years on Count 6. Accordingly the aggregate sentences actually imposed for the five separate offenses are for five years or more. Respondent, therefore, would be excludable under Section 212(a)(10), as well, unless the "political offenses" exception is applicable.

POLITICAL OFFENSES

Respondent's convictions were had before Special Criminal Courts in the Republic of Ireland. These courts have been created and activated to prosecute

certain criminal offenses (Scheduled Offenses). The Explosive Substances Act, 1882 and the Firearms Acts 1925 to 1971 are specified as Offenses Against the State by Order given on May 30, 1972. [Exhibit 63].

The respondent and the Service have produced documents and testimony concerning the history and operation of the Special Courts. I do not find that the two views of the same facts which seem to exist require precise definition before we arrive at our disposition of the matter. The general problem may be perceived as follows:

1. Irish Nationalist objection to continued British control of the six counties of Ulster erupted into violent demonstrations in Northern Ireland once again in 1969. The intensity of these clashes between Irish nationalists and loyalists in Northern Ireland has left a

trail of death and terror whose end is not yet in sight.

2. The Irish Republican Army (IRA) or Provisional Irish Republican Army (P.I.R.A.) and other groups have been identified with the activist and/or terrorist activities in Northern Ireland. The I.R.A. and for P.I.R.A. actions have not been confined to Northern Ireland. Their organizational and operational activities have also been carried on in the Republic of Ireland. In addition to isolated acts of terror (assassinations for example) the Republic has been used as a relatively privileged sanctuary to support the terrorist activity in Northern Ireland.

To combat those activities the Irish Government has invoked special measures, including the Offenses Against the State Act, 1939 and the reactivation of a system of Special Courts to try those

charged with violations of certain Scheduled Offenses, including the Explosive Substances Act 1882 and the Firearms Act 1925 to 1971. The respondent's convictions were for offenses under those Acts, tried before such Sspecial Courts.

3. The respndent is or was a member of the IRA. He readily admits his membership and commitment. The criminal activities for which he was convicted were undertaken on behalf of the IRA or PIRA according to the respondent.

In substance then the respondent claims his crimes were political offenses because they were undertaken in support of IRA objectives. Those objectives have not been fully articulated despite the comparatively lengthy record. Broadly speaking they envisage an end to British sovereignty anywhere in Ireland.

In theory, at least, some of the

activists call for a totally new system of government for all of Ireland and its four historical provinces. At best that objective is one held by only a small element of the splintered groups. But assuming a broader spectrum of opinion supported it, the language of the Seventh Circuit is instructive:

> Terrorist activity seeks to promote social chaos. Modern international terrorism is a phenomenon apart from the world's experience with more conventional expressions by individuals or groups of their dissatisfaction with world order. Such terrorism does not conveniently fit the categories of conflict with which the courts and the international community have dealt in the past. An on-going, defined clash of military forces may be significant because that is one backdrop which may bring into sharp relief an individual act of violence. Once the circumstances move away from that context, the judiciary's task of determining what degree or type of violent disturbance permits a successful invocation of the political offense exception becomes more difficult. It also poses a different question of proof then otherwise may be involved. See generally Lubet & Czackes at 206, 208-10.
>
> For example, the evidence in this case reveals that the PLO seeks the destruction of the Israeli political structure (Tr. 805) as an incident of the

expulsion of a certain population from the country and thus directs its destructive efforts at a defined civilian populace. That, it could be argued, may be sufficient to be considered a violent political disturbance. If, however, considering the nature of the crime charged, that were all that was necessary in order to prevent extradition under the political offense exception nothing would prevent an influx of terrorists seeking a safe haven in America. Those terrorists who flee to this country would avoid having to answer to anyone anywhere for their crimes. The law is not so utterly absurd. Terrorists who have committed barbarous acts elsewhere would be able to flee to the United States and live in our neighborhoods and walk our streets forever free from any accountability for their acts. We do not need them in our society. We have enough of our own domestic criminal violence with which to contend without importing and harboring with open arms the worst that other countries have to export. We recognize the validity and usefulness of the political offense exception, but it should be applied with great care lest our country become a social jungle and an encouragement to terrorists everywhere. Ziyad Abu Egin v. Wilkes, 641 F2d. 504, cert. denied ____ U.S. ___, 102 S.Ct 390 (1981).

Although EAIN dealt with extradition, and I am here dealing with Deportation and the Refugee and Asylum provisions of the Immigration and Nationality Act, the rationale is, if anything, more persuasive

in this context.

Here the respondent was not a part of an organized, identifiable, discrete force openly at war with the State.[7] At best he was a member of a clandestine secret group, whose energies were directed against the authorities of Northern Ireland, not the Republic whose laws he violated. As such I conclude that the offenses for which he was convicted were for Acts of a criminal nature which were not "purely political" within the meaning of Section 212(a)(9) or 212(a)(10).[8] The same acts performed in the United States in relation to arms and explosives would also be criminal even if carried out for the same purpose. (See 18 USC Section *831 et seg.)

VIII ASYLUM OR WITHHOLDING DEPORTATION

Respondent has applied for asylum under Section 243(h) of the Act. Under those sections the respondent must show

he is a refugee under Section 101(a)(42) or that he is unwilling to return to the Republic or Ireland because of "persecution or a well founded fear of persecution because of race, religion, nationality, or membership in a particular social group or political opinion,"... In his request for asylum the respondent cites his membership in the IRA and his political opinion as the reasons for which he believes he would be persecuted (Exhibit 44, Item 17). If returned to the Republic of Ireland he states he believes:

> I would be placed in prison to serve the remainder or my sentence for purely political crimes and I would be placed on trial and sentenced for my escape for which I could receive a maximum sentence of life imprisonment.

Unless reject the right of the Republic of Ireland to punish criminal activity within its territory, the idea that such prosecution and enforcement is persecution must be rejected.

The respondent and government produced documents and testimony on the Special Courts and their procedure.[9] I do not find any fundamental factual issues. There are Special Courts, with special procedures involving, among other differences from the ordinary courts, trial by Judges without a Jury and procedural rules differences. Appeals through the Irish court system are allowed.

There are differences in the views of the respondent and the government's witnesses as to the penal conditions imposed. On the one hand, it is indicated that the Irish Government segregates the criminals from the Special Court as political prisoners with special privileges in the prison.[10] The government's witness stated that they are treated as all other criminals, no worse - no better.[11] Either view belies mistreat-

ment or torture and the like.[12/] To be sure, there is a deprivation of freedom following a criminal trial. I do not find that to measure up to the statutory requirement of persecution under section 101(a)(42) or Section 243(h). The request for asylum or an order interdicting deportation to the republic of Ireland will be denied.

IX VOLUNTARY DEPARTURE

The respondent, having been found deportable under Section 241(a)(5) may not be authorized to depart voluntarily under Section 244(e). Respondent has designated Sweden as the place to which he would wish to be sent, if deported.

The following orders are entered:

ORDER: It is ordered that the respondent be deported from the United States to Sweden on the second and third LODGED CHARGES, only.

IT IS FURTHER ORDERED THAT if the

aforenamed country advises the Attorney General that it is unwilling to accept the respondent into its territory or fails to advise the Attorney General within three months following original inquiry whether it will or will not accept respondent into its territory, the respondent shall be deported to the Republic of Ireland.

IT IS FURTHER ORDERED that the respondent's application for Adjustment of Status and waivers of inadmissibility be denied.

IT IS FURTHER ORDERED that the request for asylum under Section 208 be denied.

IT IS FURTHER ORDERED that the request that deportation to the republic of Ireland be interdicted be denied.

FRANCIS J. LYONS
IMMIGRATION JUDGE

FOOTNOTES

1. Notice of Additional Charges, Exhibit #31.

2. Notice of Additional Charges, Exhibit #32.

3. My Conclusions throughout this decision are made in my consideration of the record as whole. Prior to assuming jurisdiction of the Matter, I familiarized myself with the Record of Proceedings held before Judge Hupp, whom I replaced on June 29, 1981 due to his recusal. See Exhibit 40.

4 Questions raised by respondent's counsel while the matter was pending before Judge Hupp concerning the institution of the proceedings, for example, are not pressed in his brief filed in letter form dated May 4, 1982. I assume they have abandoned.

5. Respondent's Memorandum of Law, Exhibit 35, page C.

6. Respondent faces expulsion from the United States not necessarily return to the Republic of Ireland. In view of my disposition of the matter, he is free to go to any country that will accept him; failing that the government must first ask the Swedish government to accept him as a deportee.

7 There is no evidence to show the existence of a political uprising against the Republic of Ireland; nor is there any evidence that the government of that country is unable

or unwilling to deal with criminals within its borders. Indeed the sense of the respondent's evidence is that the government is unduly zealous in its efforts to combat criminal activities in aid of the Republicans in Northern Ireland.

8. While it might be argued that I should adopt the official view of the Department of State as to the nature of the criminal conviction, I have not relied on the testimony of Mr. Fields in reaching my conclusion. I make my decision on the basis of my conclusions as an independent judicial officer. Compare: Matter of Mackin, 668 F.2d (2d Cir. 1981).

9. See transcript October 22, 1981 O'Rourke, November 23, 1981 McGuffin, March 22, 1982 Shed____(?) in and March March 23, 1982 Barr.

10. Ibid.

11. Ibid.

12 There is no testimony to the effect that the Irish authorities in the Republic mistreated the respondent: or that he fears they would. There is also no subjective claim made by respondent as to fear of either the authorites of the I.R.A. Compare McMullen v. I.N.S., 658 F.2d 1312 (9th Cir. 1981)

See Paragraph 84, Handbook on Procedures and Criteria for determining refugee Status, Office of the High Commissioner for Refugees, Geneva, September 1979.

UNITED STATES DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS
WASHINGTON, D.C. 20530

May 24, 1983

File: A22 607 396 - Philadelphia

In re: MICHAEL O'ROURKE
a/k/a PATRICK MANNION

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
James J. Orlow, Esquire
Wasserman, Orlow, Ginsberg & Rubin
Suite 936, Public Ledger Building
Sixth and Chestnut Streets
Philadelphia, Pennsylvania 19106

ON BEHALF OF SERVICE:
Gerald S. Hurwitz
Appellate Trial Attorney

ORAL ARGUMENT: October 13, 1982

CHARGE:

Lodged: Sec. 241(a)(2), I&N Act (8 U.S.C. 1251(a)(2)) - Nonimmigrant - remained longer than permitted

Sec. 241(a)(5), I&N Act (8 U.S.C. 1251(a)(5)) - Failed to report address or change of address

APPLICATION: Adjustment of status, withholding of deportation, asylum, or voluntary departure

The respondent appeals from the July 12, 1982, decision of the immigration judge ordering him deported to the Republic of Ireland. He found the respondent deportable under sections 241(a)(2) and 241(a)(5) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(2) and 1251 (a)(5), respectively, for remaining in the United States longer than authorized and having failed to report his address as required under section 265 of the Act, 8 U.S.C. 1305. He also denied the respondent's applications for adjustment of status and voluntary departure as well as for waivers of inadmissibility, temporary withholding of deportation, and asylum. See sections 245, 244(e), 212(h), 212(i), 243(h), and 208 of the Act, 8 U.S.C. 1255, 1254(e), 1182(h) 1182(i), 1253(h), and 1158, respectively. The appeal will be dismissed.

FACTS

The respondent is a 30-year-old native and citizen of the Republic of Ireland, who arrived in the United States on February 16, 1978, using a passport bearing the name Patrick Martin Mannion. He was admitted as a nonimmigrant visitor authorized to remain in the United States until March 9, 1978. He admits that he has remained in the United States longer than authorized and is, therefore, deportable as an overstay on the charge lodged on June 17, 1980, against him, pursuant to section 241(a)(2).

The respondent's name is Michael O'Rourke, and not Patrick Mannion. He used a fraudulent passport bearing someone else's name because he was a fugitive from prison in his native Ireland (June 17, 1980, Tr. p. 374), where he had been convicted on July 7 and 9, 1975, on several counts of illegal possession of

explosive substances, and unlawful possession of firearms to enable another person to endanger life, in violation of section 4 of the Explosive Substances Act of April 10, 1983, and section 15(b) of the Firearms Act of 1925, as amended by the Firearms Act of 1964 and 1971. (Ex. 7, 8, Group Ex. 14) His unlawful activities stemmed from his membership in the Provisional Irish Republican Army (P.I.R.A.).

At his deportation hearing on May 20, 1981, the respondent admitted that he became a full-fledged member of the P.I.R.A. in 1972, manufacturing bombs, mortars and rockets. (Tr. p. 133) He was assigned as an "engineer" to the P.I.R.A. General Headquarters for research and development of ordinance, incendiaries and grenades. (Tr. p. 71, 161) He was also involved in the setting up of P.I.R.A. "engineering factories" for the production of explosives, grenades,

mortars and rockets to be used in Northern Ireland.) Tr. p. 73-74, 77-81) He admitted that these weapons were intended for use against British officials as well as "loyalist" residents of Ulster and "economic" targets. (Tr. p. 82-83, 140, 164) His duties also included inspecting the bombs he manufactured, as well as training P.I.R.A. members in their use. (Tr. p. 84) However, he claims that he did not know some of the specific targets against which his bombs would be used and that he only manufactured their casing and not their explosive parts. (Tr. p. 140)

The respondent managed to escape from the custody of the Irish authorities by using explosives, after arranging to have himself and three others called as defense witnesses in another P.I.R.A. trial. He then resumed his P.I.R.A. activities under the assumed name of Patrick Martin

Mannion. He entered the United States under that name as a nonimmigrant visitor but did not depart as required by March 9, 1978. (March 27, 1980, Tr. p. 218-220) (May 20, 1981, Tr. p. 100-103) He stayed in the United States with his employer, until the latter was sentenced to prison for smuggling weapons to Ireland. (Tr. p. 119-122) In a separate matter not presently before us, we concluded that the respondent qualified as the immediate relative spouse of a United States citizen. See section 201(b) of the Act, 8 U.S.C. 1151(b).

ISSUES

The immigration judge found the respondent ineligible for adjustment of status and voluntary departure in lieu of deportation, and unworthy of either form of relief as a matter of discretion. He also found that the likelihood that he would be imprisoned in his native Ireland

would not sustain his burden of establishing a well-founded fear of persecution for purposes of asylum and temporary withholding of deportation. The respondent contends that his convictions were for purely political offenses, and he should have been granted adjustment of status or the other reliefs from deportation sought. He claims also that if he were deemed excludable, he is entitled to a waiver of inadmissibility under both sections 212(h) and 212(i) of the Act, due to his United states citizen spouse.[1/] He also cites the convictions as evidence that he has a well-founded fear of persecution in Ireland. After reviewing the extensive record before us we agree with the immigration judge's conclusion that the respondent is

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1/ Sections 212(h) and 212(i) can waive excludability for qualifying aliens in the exercise of discretion for crime and fraudulent attempts to enter the United States.

undeserving of discretionary relief from deportation. We also agree that the respondent's incarceration in the Republic of Ireland does not establish his eligibility for temporary withholding of deportation and asylum.

DISCRETIONARY RELIEF

Section 245 of the Act reposes with the Attorney General and his delegates the discretionary power to grant adjustment of status, INS v. Bagamasbad, 429 U.S. 24 (1976); Thomaidis v. INS, 431 F.2d 711 (9th Cir. 1970), cert. denied 401 U.S. 954 (1971); Matter of Arai, 13 I&N Dec. 494 (BIA 1970). Adjustment of status is, therefore, a matter of administrative grace, not mere statutory eligibility. Hintopoulos v. Shaughnessy, 353 U.S. 72 (1957); Ameeriar v. INS, 438 F.2d 1028 (3d Cir. 1971). Thus, an applicant

who merely meets the prerequisites for adjustment of status is in no way entitled to such relief. Jarecha v. INS, 417 F.2d 220 (5 Cir. 1969); Chen v. Foley, 385 F.2d 929 (6 Cir. 1967), cert. denied 395 U.S. 838 (1968).

The burden of proof is upon the respondent to establish not only that he meets all statutory requirements for eligibility but also that he is worthy of the exercise of discretion in his favor. 8 C.F.R. 242.17(d); Ameeriar v. INS, supra; Thomaidis v. INS, supra. Since the adjustment of status of an alien is an extraordinary relief, it should be granted only in meritorious cases. Ameeriar v. INS, supra; Chen v. INS, supra. The exercise of discretion in a particular case necessarily requires a consideration of all the facts and circumstances involved. In Matter of Arai, 13 I&N Dec. 494 (BIA 1970), we held

that where adverse factors are present in a given application, it is necessary for the applicant to offset these factors by a showing of unusual or even outstanding equities. Generally, favorable factors such as family ties, hardship, length of residence in the United States, etc., will be considered as countervailing factors meriting a favorable exercise of administrative discretion. However, here the negative factors are such, that the favorable exercise of discretion is unwarranted. Consequently, we need not decide whether the respondent is excludable under section 212(a)(19) of the Act before concluding that adjustment relief should be denied.

We acknowledge that the respondent has a significant discretionary factor in his favor in his United states citizen spouse. That is, however, the only significant factor in his favor. That equity

is far outweighed by the extremely serious negative discretionary factors. The respondent admits his involvement with the manufacture of explosives to be used for terrorism. He hedged when asked to disavow indiscriminate political violence. (March 9, 1982, Tr. pp. 115, 117) He escaped from prison by using explosives, and fraudulently obtained a United States visa using an alias. See Balami v. INS, 669 F.2d 1157 (6 Cir. 1982). He continued to conceal his identity until it was no longer possible.2/ Moreover, his spouse was well aware that the respondent was an escapee from an Irish prison, here illegally. (Tr. p. 15, 31, 49-50) Subsequent to the marriage the couple lived separately without her receiving

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2/ The respondent did not reveal his true identity until June 17, 1980, in his fourth deportation hearing, after sustantial evidence had been introduced by the Service in order to establish his deportability. (Tr. p. 351)

any financial support. (Tr. p. 40-41, 47-48) His admission into the United States would be detrimental to our relations with both the Republic of Ireland and Great Britain. (June 29, 1981, Tr. p. 25-27, 63) See Matter of Lee, 13 I&N Dec. 236 (BIA 1969). We concluded that the respondent does not merit the favorable exercise of discretion. The immigration judge properly denied the discretionry applications for adjustment relief. INS v. Bagamasbad, supra; Balami v. INS, supra; Matter of Arai, supra. His conduct has been so reprehensible so as to also warrant the discretionary denial of asylum and voluntary departure in lieu of deportation. Matter of Salim, Interim Decision 2922 (BIA 1982); Matter of Rojas, 15 I&N Dec. 722 (BIA 1982).

PERSECUTION

We must also proceed to evaluate the

respondent's persecution claim, despite concluding that he is undeserving of asylum relief as a matter of discretion. subsequent to the enactment of the 1980 Refugee Act, temporary withholding of deportation pursuant to section 243(h) of the Act is no longer discretionary, in order to prevent refoulment. Matter of Salim, supra. He must establish that he is a "refugee" within the meaning of Section 101(a)(42)(A) of the Act, 8 U.S.C. 1101(a)(42)(A). Matter of Lam, Interim Decision 2857 (BIA 1981). That section defines a refugee as:

> any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to avail himself of herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

The respondent bears the burden of proof

in asylum and 243(h) relief applications to establish that his life or freedom would be threatened within the five circumscribed grounds of persecution enumerated in sections 101(a)(42) and 243(h)(1). Matter of Lam, supra; Matter of Exilus, Interim Decision 2914 (BIA 1982); Matter of Dunar, 14 I&N Dec. 310 (BIA 1973); Matter of Chumpitazi, 16 I&N Dec. 629 (BIA 1978).

We conclude that the respondent has not established a well-founded fear of persecution on account of his political opinion. He has failed to establish that his possible prosecution by the Republic of Ireland would be for political reasons rather than for his criminal conduct.

The terrorist use of explosives has been universally condemned as atrocious in nature. Paragraph 152 of the United Nations Handbook on Procedures and Criteria or Determining Refugee Status

(September 1979) (Handbook), states that in evaluating the political nature of criminal acts "the political element of the offense should outweigh its common-law character. This would not be the case if the acts committed are grossly out of proportion to the alleged objective. The political nature of the offense is also more difficult to accept if it involves acts of an atrocious nature." In the past we have used these guidelines as evidence of Congressional intent in interpreting the 1980 Refugee Act. See Matter of Rodriguez-Palma, 17 I&N Dec. 465 (BIA 1980). We find that the respondent's indiscriminate terrorist use of explosives is atrocious in nature and out of proportion to the political goal of ending British domination over Northern Ireland.

Our conclusion is not changed by the repondent's reference to an annotation in

the State Department Foreign Affairs Manual at 9 F.A.M. 22 C.F.R. 42.91(a)(9) at Note 10, Gordon and Rosenfield, Immigration Law and Procedure, Section 32-502 (1982). The annotation relates that a member of the I.R.A. convicted of armed robbery for participating in an armed raid was found to be convicted of a "purely political" offense and not excludable under section 212(a)(19). We need not decide the respondent's excludability under that section before concluding that adjustment relief is unwarranted.

Moreover, we note that the annotation does not disclose what court made that finding or contain sufficient details to ascertain its applicability to this case. As respondent's counsel recognized at oral argument, such an annotation by itself has no binding effect on our view. In any event, despite similar political goals, the facts here are different. The respon-

dent's activities were the manufacture and supply of explosives to be used for terrorism. His political motivation alone does not justify his terrorist methods. Also, the respondent's crimes were committed in the Republic of Ireland, not in Northern Ireland. They are more like those of an anarchist, even if politically motivated. See Eain v. Wilkes, 641 F.2d 519 at 520-523, (7 Cir. 1981). In Eain, a Palestinian Liberation Organization (P.L.O.) terrorist had bombed a market on the West Bank. Placing the bomb was held not to be an action pursuant to a war, rebellion, or revolution, and therefore not a purely political offense. The Republic of Ireland's prosecution of the respondent for his terrorist activities is a legitimate attempt to protect its citizens from the dangers caused by the respondent's criminal activities.

On the basis of the record, we are

satisfied that the respondent has not shown that he will be persecuted or that he has a well-founded fear of persecution within the contemplation of section 208(a) of 243(h) of the Act. Our conclusion as to the respondent's claim is the same whether we apply a standard of "clear probability," "good reason," or "realistic likelihood." See Stevic v. Sava, 678 F.2d 401 (2d Cir. 1982); Estrella-Reyes v. INS, Civ. No. 81-3157 (9th Cir. November 18, 1982); contra; Rejaie v. INS, 691 F.2d 139 (3d Cir. 1982); Matter of McMullen, 17 I&N Dec. 542 (BIA 1980), rev'd on other grounds McMullen v. INS, supra; see Matter of Lam, supra; Matter of Dunar, supra. Hence, the respondent's appeal from the denial of his application for asylum under section 208 of the Act and withholding of deportation under section 243(h) of the Act is also without merit. The respondent has failed to establish

that the Irish government would politically persecute him if it prosecutes and punishes him for his criminal activities. Such prosecution would not be persecution. Matter of Sun, 11 I&N Dec. 872 (BIA 1966). The applications for asylum and 243(h) relief were properly denied for failing to establish elgibility for such relief.

OTHER ISSUES RAISED

The rest of the legal issues raised by the respondent on appeal are also without merit. His contention that he should be allowed to depose the author of the State Department's Bureau of Human Rights and Humanitarian Affairs opinion in his case has been recently rejected. Matter of Exilus, supra. His argument that the immigration judge lacked jurisdiction over his case because of alleged changes in the pay classification for immigration judges is also meritless. 8 C.F.R. 242.8 provides the jurisdictional

basis for the immigration judge's conduct of the deportation proceedings.

His contention that the immigration judge who initially conducted these proceedings would have ruled differently, but was intimidated into withdrawing, is neither supported by the record nor any longer relevant, because of our independent review of the evidence on appeal. See Carrasco-Pavelau v. INS, 445 F.2d 865 (9 Cir.) cert. denied, 405 U.S. 1030 (1971); Noverola-Bolaina v. INS, 395 F.2d 131 (9 Cir. 1968); Matter of B-, 7 I&N Dec. 1 (BIA 1955). There is also extensive evidence in the record supporting the immigration judge's July 12, 1982, conclusions. Finally, the respondent's contention that he was unfairly charged with failing to register his address during the time he was detained by the Service is a blatant misrepresentation. He was chzrged with failing to report his

address from February 16, 1978, when he arrived here, until apprehended by the Service on October 20, 1979. His demand that the 1981 amendment to Section 265, Section 11, Pub. 97-116, 95 Stat 1617, be given retroactive effect in his case, is inconsistent with the plain language of the General Savings Clause, 1 U.S.C. 109. See United States v. Cahalane, 560 F.2d 601 (3 Cir. 1977). In any event, this latter contention is of no consequence in view of his undisputed deportability under Section 241(a)(2) as an overstay. The appeal will be dismissed.

ORDER: The appeal is dismissed.

Chairman

PROOF OF SERVICE BY MAIL

State of California

SS.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the county of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 256 South Occidental Boulevard, Los Angeles, California 90057; that on April 9, 1984, I served the within Petitioner's Supplemental Appendix in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, U.S. Supreme Court
One First Street, N.E.
Washington, D.C. 20543
(Forty copies and original.)

Solicitor General
Department of Justice
Washington, D.C. 20530
(Three copies)

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 9, 1984, at Los Angeles, California.

Carlos Holguin
(Original Signed)

Office - Supreme Court, U.S
FILED
MAY 24 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1615

In the Supreme Court of the United States

OCTOBER TERM, 1983

MICHAEL O'ROURKE, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

THOMAS W. HUSSEY
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QUESTIONS PRESENTED

1. Whether the Immigration and Naturalization Service abused its discretion in denying relief from deportation in light of petitioner's claim that his offenses in Ireland were "purely political offenses" under the exclusion provisions of 8 U.S.C. 1182(a)(9) and (10).

2. Whether the immigration judge erred in denying petitioner's request for discovery and a hearing on the issue of the recusal of the preceding immigration judge.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1615

MICHAEL O'ROURKE, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is unreported. The opinions of the Board of Immigration Appeals (Pet. Supp. App. A34-A54) and the immigration judge (Pet. Supp. App. A1-A33) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 21, 1984. The petition for a writ of certiorari was filed on April 2, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a native and citizen of the Republic of Ireland. By 1972, he was a full-time member

of the Provisional Irish Republican Army (PIRA).[1] His duties included directing research and development in the production of ordnance, incendiaries, and grenades (R. 1043), supervising bomb factories in the Republic of Ireland (R. 955-956), and training other individuals in the use of explosives (R. 965). The explosive devices were produced for use against both the British forces in Northern Ireland (R. 964-965) and what petitioner characterized as "economic" or "non-military" targets in Northern Ireland (R. 1022, 1046). As the Board of Immigration Appeals summarized the record (Pet. Supp. App. A50), petitioner's "activities were the manufacture and supply of explosives to be used for terrorism."

In July 1975, petitioner was convicted twice in the Republic of Ireland for the illegal possession of firearms and explosives (R. 1704-1707, 1734-1739). The first conviction, involving the possession of explosive substances under suspicious circumstances (R. 2079-2081) and the unlawful and malicious possession of firearms with intent to enable any other person to endanger life or cause serious injury to property (R. 2082), was based on petitioner's supervision of a bomb factory operated under the cover of a com-

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[1] The Provisional Irish Republican Army was formed in approximately 1970 when the remnant of the Irish Republican Army (IRA) split into an "Official" and a "Provisional" wing. See, *e.g.*, P. Johnson, *Ireland* 222 (1981) (R. 992). As conceded by petitioner in his appeal to the court below (Petitioner's Corrected Opening Br. 40-41), the salient characteristic of the PIRA has been its unyielding commitment to violence, and it is generally considered to be a "clandestine, terroristic organization." *McMullen* v. *INS*, 658 F.2d 1312, 1318 (9th Cir. 1981).

pany he had established. His subsequent conviction, also for the illegal possession of firearms and explosives (R. 1707, 1734, 1735), related to a second bomb factory at his father's residence (R. 956-958). Petitioner received concurrent sentences of six years' imprisonment (R. 1704-1739).

In July 1976, petitioner and other prisoners escaped from custody by detonating explosives in a Dublin courthouse where they had been summoned as witnesses (R. 981-983). Petitioner served as the engineering officer in the escape (R. 982).

Following his escape, petitioner returned to the PIRA and worked with one of the "active service unit[s]," the "prime offensive arm" of the PIRA (R. 764, 1978). Shortly after petitioner's escape, the PIRA murdered the British ambassador to Dublin with an explosive device; petitioner stated that he was sought by the Irish police in connection with the murder (R. 989-991). According to petitioner, this led him to leave the Republic of Ireland (R. 990).[2] Petitioner testified during his deportation proceeding that he was opposed to leaving Ireland and that his "mind was on going back" (R. 990, 1011, 1014).

2. On or about November 29, 1977, petitioner applied for a visitor's visa at the United States Embassy in Dublin. In making this application he used the false identity of Patrick Mannion and presented an Irish passport in that name (R. 1077, 1081).[3]

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[2] However, petitioner did not leave the Republic of Ireland until 19 months after the murder, and three months after he obtained a visa.

[3] Section 222(c) of the Immigration and Nationality Act, 8 U.S.C. 1202(c), requires each applicant for a non-immigrant visa to "state his full and *true* name, the date and place of birth, his nationality [and] the purpose and length of his in-

Petitioner departed for the United States three months later and was admitted under the assumed name of "Mannion"; upon inspection by immigration authorities, petitioner did not disclose his true identity or fugitive status (R. 1012-1013). See 8 U.S.C. 1225. Under the fraudulently obtained visa, petitioner's authorized stay was for approximately three weeks (R. 1810). See 8 U.S.C. 1184.

Upon his arrival in the United States, petitioner began working on a full-time basis (R. 1003-1004), which violated the prohibition against employment by visitor aliens. See 8 C.F.R. 214.1(c) (1979); *Ghorbani* v. *INS*, 686 F.2d 784, 786 (9th Cir. 1982). In addition, petitioner never resided at the address that he had provided to United States authorities at the time of his entry (R. 1001); instead, he stayed with Daniel Cahalane, who was petitioner's principal employer until Cahalane was convicted of federal offenses relating to the illegal export of weapons to Northern Ireland (R. 1003-1004). Furthermore, petitioner never registered his current address as required by Section 265 of the Act, 8 U.S.C. 1305. Finally, petitioner failed to depart at the end of the stay authorized by his fraudulently obtained visa and did not seek any extensions; rather, petitioner scratched out the notation "three week visit" placed on his passport by the American Embassy in Dublin (R. 1003).[4]

On October 30, 1979, petitioner was arrested by INS agents (R. 1527-1528). During the 19-month period between his entry and arrest, petitioner neither

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tended stay" (emphasis added). Petitioner's attorney conceded at the deportation proceeding that there was "some crime committed here in entry" (R. 1598).

[4] 18 U.S.C. 1546 makes such action a criminal offense.

filed a claim for asylum nor sought adjustment of his immigration status.

3. a. Following petitioner's arrest, deportation proceedings were commenced against him. At the first several deportation hearings petitioner refused to identify himself (*e.g.*, R. 1303-1309, 1467) but, in light of extensive INS evidence establishing his true name, petitioner finally admitted his identity and described how he had entered the United States under the alias "Patrick Mannion" (R. 1076-1078, 1080-1084).

As amended, the charges against petitioner alleged that he was subject to deportation under Section 241 (a)(2) of the Act, 8 U.S.C. 1251(a)(2), for overstaying his visitor's visa, for failing to show the time, place, and manner of his entry (see 8 U.S.C. 1361 and 8 C.F.R. 242.16(d)), and for entering the United States without inspection, and under Section 241(a)(5) of the Act, 8 U.S.C. 1251(a)(5), for failing to register with the INS. Petitioner conceded that he was deportable on the ground of overstaying his visa (R. 1110-1111, 1113). When petitioner declined to select a country to which he wished to be sent if deportation were ordered, Immigration Judge Hupp designated the Republic of Ireland (R. 893). See 8 C.F.R. 242.17(c).

At the hearing of June 17, 1980, petitioner submitted an application for adjustment of his immigration status to lawful permanent resident alien under Section 245 of the Act, 8 U.S.C. 1255, on the ground that he had entered into a contract of common-law marriage with a United States citizen in July 1979 (R. 1115, 1757-1758).[5] Section 245 authorizes the

[5] At the same time an immediate relative visa petition was submitted by petitioner's common-law wife. The matter was

INS, in its discretion, to adjust the immigration status of an alien who demonstrates that he is legally eligible for such relief, including, inter alia, that he is admissible to the United States and not excludable on any of the grounds specified in Section 212(a) of the Act, 8 U.S.C. 1182(a). See, *e.g.*, *Elkins* v. *Moreno*, 435 U.S. 647, 667 (1978); *INS* v. *Bagamasbad*, 429 U.S. 24, 24, 26 (1976); 2 C. Gordon & H. Rosenfield, *Immigration Law and Procedure* §§ 7.3, 7.7 (rev. ed. 1984). Because petitioner's convictions in the Republic of Ireland and his fraudulent entry into the United States were grounds for exclusion under Section 212(a)(9), (10) and (19) of the Act, 8 U.S.C. 1182(a)(9), (10) and (19), his application for adjustment of status was later supplemented (R. 899, 1781) by an application for discretionary waiver of exclusion pursuant to Section 212(h) and (i) of the Act, 8 U.S.C. 1182(h) and (i). In addition, petitioner eventually sought (R. 732-733, 874-875, 877, 894, 1951-1958) political asylum (Section 208, 8 U.S.C. 1158) and withholding of deportation (Section 243(h), 8 U.S.C. 1253(h)) based on his claim of persecution in the Republic of Ireland. Finally, petitioner filed an application for voluntary departure under Section 244(e) of the Act, 8 U.S.C. 1254(e), and indicated that he would return to Ireland if his application were granted (R. 539); alter-

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remanded to the INS District Director for adjudication of the visa petition (R. 1116-1118). In January 1981, the District Director denied the petition (R. 313-314). Petitioner appealed to the Board of Immigration Appeals, which in April 1981 determined that petitioner was the spouse of a United States citizen and approved the immediate relative visa petition (R. 1771-1775). Thereafter, petitioner's deportation hearing resumed to consider his application for adjustment of status.

natively, petitioner designated Sweden as the country of deportation in the event voluntary departure were denied (see Section 243(a), 8 U.S.C. 1253(a)).

b. On June 4, 1981, Immigration Judge Hupp sua sponte entered an order recusing himself from further proceedings on the ground that he was no longer "able to make an objective and impartial decision" (R. 1905).[6] In accordance with 8 C.F.R. 103.1(f) and 242.8(b), the Acting Chief Immigration Judge assigned Judge Lyons to hear the case.

Petitioner's hearing resumed on June 29, 1981. At the commencement of the hearing, Judge Lyons answered questions from petitioner's counsel about his selection as a replacement for Judge Hupp. He denied petitioner's oral request for discovery on the matter of Judge Hupp's voluntary recusal, ruling that petitioner's claims about the recusal were irrelevant to the issues in the ongoing deportation proceeding (R. 793). Judge Lyons also denied petitioner's motion to have the case reheard from the beginning (R. 787-795) and completed the proceeding in accordance with 8 C.F.R. 242.8(b). See *Pereira-Diaz* v. *INS*, 551 F.2d 1149, 1154 (9th Cir. 1977).

The June 29 hearing was adjourned in response to petitioner's request for 30 days within which to present additional evidence (R. 875-879). Petitioner resumed presentation of his case on October 22, 1981. He again took the stand to testify in support of his

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[6] Judge Hupp's recusal was based on the fact that he had been under surveillance by agents of the INS Office of Professional Responsibility. INS affidavits submitted below indicated that this investigation of Judge Hupp was unrelated to petitioner's deportation proceeding (R. 161-166, 175-182, 1905).

application for political asylum and reiterated much of his testimony before Judge Hupp about his work with the PIRA (R. 734-780). Petitioner expressed concern about being returned to Ireland to serve the remainder of his sentence and to be prosecuted for his escape (R. 766-768), but he made no claim that he had been mistreated while in prison in that country.

4. The immigration judge found that petitioner was deportable under Section 241(a)(2) for overstaying his visa and under Section 241(a)(5) for failing to register with the INS (Pet. Supp. App. A2-A4). In addition, he denied petitioner's requests for relief from deportation.

With respect to an adjustment of status, the immigration judge rejected petitioner's application on two grounds. First, he concluded that petitioner was excludable in light of his convictions in Ireland (see Section 212(a)(9) and (10), 8 U.S.C. 1182(a)(9) and (10)), finding that petitioner's offenses were not "purely political offenses" within the meaning of the Act (Pet. Supp. App. A16-A27). As the judge explained (*id.* at A27 (footnotes omitted)):

> Here [petitioner] was not a part of an organized, identifiable, discrete force openly at war with [the Republic of Ireland]. At best he was a member of a clandestine secret group, whose energies were directed against the authorities of Northern Ireland, not the Republic whose laws he violated. As such I conclude that the offenses for which he was convicted were for [a]cts of a criminal nature which were not "purely political" within the meaning of Section 212(a)(9) or 212(a)(10). The same acts performed in the United States in relation to arms and explosives would also be criminal even if carried out for the same purpose.

Furthermore, the judge held that petitioner was not entitled to discretionary waiver of excludability pursuant to Section 212(h) of the Act, 8 U.S.C. 1182(h), because he had not satisfied the statutory requirement of showing "extreme hardship to his wife. * * * [T]here is no demonstrated hardship to the citizen spouse in this case" (Pet. Supp. App. A10, A12). Accordingly, the judge ruled that petitioner did not meet the standards in the Act for admissibility to the United States and therefore was not legally eligible for an adjustment of status.

Second, the immigration judge held that, apart from petitioner's ineligibility on legal grounds, an adjustment of status would be denied in the exercise of discretion. After summarizing petitioner's escape from Ireland and his illegal entry into the United States (Pet. Supp. App. A15-A16), the judge found that (*id.* at A16)

> even if [petitioner] were not inadmissible under Section 212(a)(9) o[r] (10) because of the claimed political nature of his criminal activities, his immigration record involving conscious, willful deception and fraud would argue against any discretionary grant of the extraordinary relief of adjustment of status * * *. On that basis the record does not justify a grant of adjustment of status under Section 245.

The judge emphasized that this "conclusion [denying adjustment of status as a matter of discretion] stands on its own without reaching" the issue of petitioner's excludability for his convictions in Ireland and his claim that those convictions were for "political crimes" (*ibid.*).[7]

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[7] For the same reasons that he denied the adjustment of status, the judge also declined to grant a discretionary waiver

The immigration judge also rejected petitioner's other claims for relief from deportation. He denied petitioner's application for political asylum under Section 208 of the Act, 8 U.S.C. 1158, and for withholding of deportation under Section 243(h) of the Act, 8 U.S.C. 1253(h),[8] on the ground that petitioner had not met his burden of proof to demonstrate a well-founded fear of persecution in the Republic of Ireland (Pet. Supp. App. A27-A30). The judge further denied petitioner's request for voluntary departure (*id.* at A30).

5. The Board of Immigration Appeals (BIA) dismissed petitioner's appeal from the decision of the immigration judge (Pet. Supp. App. A34-A54). Based on its "independent review of the evidence" (*id.* at A53)[9] in the "extensive record" in the case (*id.* at A40), the BIA "agree[d] with the immigration judge's conclusion that [petitioner] is undeserving of discretionary relief from deportation" (*id.* at

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under Section 212(i) of the Act, 8 U.S.C. 1182(i), to relieve petitioner of the legal bar to admissibility (and hence to adjustment of status) based on his fraudulent entry into the United States (Pet. Supp. App. A8, A12-A16).

[8] Political asylum is a form of discretionary relief, eligibility for which is based upon a well-founded fear of persecution in the alien's native land. See Sections 208 and 101(a)(42)(A), 8 U.S.C. 1158 and 1101(a)(42)(A); 8 C.F.R. 208.1 *et seq.* By contrast, withholding of deportation is based upon persecution in the country to which an alien would be deported and is not discretionary once the applicant meets his burden of proof on the statutory requirements. See Section 243(h), 8 U.S.C. 1253(h); *In re Salim*, Interim Dec. No. 2922 (BIA Sept. 29, 1982).

[9] See also *Woodby* v. *INS*, 385 U.S. 276, 278 n.2 (1966).

A40-A41). Accordingly, the BIA did not reach the issue of petitioner's statutory eligibility for such relief (*id.* at A39-A41). See *INS* v. *Bagamasbad*, 429 U.S. 24 (1976).[10]

The BIA concluded that, in the exercise of discretion, petitioner should not be granted an adjustment of status (Pet. Supp. App. A41-A45). While recognizing that petitioner's marriage to a United States citizen is a "significant discretionary factor in his favor" (*id.* at A43), the Board held that, based on "all the facts and circumstances involved" (*id.* at A42), this consideration "is far outweighed by the extremely serious negative discretionary factors" against petitioner (*id.* at A44). As the Board explained (*id.* at A44-A45 (footnote and citations omitted)):

> [Petitioner] admits his involvement with the manufacture of explosives to be used for terrorism. He hedged when asked to disavow indiscriminate political violence. He escaped from prison by using explosives, and fraudulently obtained a United States visa using an alias. He continued to conceal his identity until it was no longer possible. Moreover, his spouse was well aware that [petitioner] was an escapee from an Irish prison, here illegally. Subsequent to the marriage the couple lived separately without her receiving any financial support. His admission into the United States would be detrimental to

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[10] For this reason, the Board did not address petitioner's excludability under Section 212(a)(9), (10) and (19) of the Act, 8 U.S.C. 1182(a)(9), (10) and (19), or his claim to waiver of excludability under Section 212(h) and (i) of the Act, 8 U.S.C. 1182(h) and (i).

> our relations with both the Republic of Ireland and Great Britain.[11]

In light of these concerns, the BIA "conclude[d] that [petitioner] does not merit the favorable exercise of discretion. The immigration judge properly denied the discretionary applications for adjustment relief" (*id.* at A45). And for the same reasons, it found that petitioner's "conduct has been so reprehensible so as to also warrant the discretionary denial of asylum and voluntary departure in lieu of deportation" (*ibid.*).

The BIA also upheld the denial of petitioner's request for withholding of deportation (Pet. Supp. App. A45-A52). Although withholding of deportation is not a discretionary form of relief (*id.* at A46; see page 10 note 8, *supra*), the Board "conclude[d] that [petitioner] has not established a well-founded fear of persecution on account of his political opinion. He has failed to establish that his possible prosecution by the Republic of Ireland would be for poli-

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[11] At petitioner's deportation hearing, an official spokesman for the Department of State testified that the

> national interests of the United States would be concerned with the adjustment of anyone's status who had a past history in which he participated in the support of acts of terrorism or carried on acts of terrorism.

R. 811. In response to inquiry concerning the effect of an adjustment of petitioner's status upon the foreign relations of the United States, the official expressed the view of the Department of State that the grant of such relief would adversely affect the credibility of our position on terrorism in the international community (R. 812-813). On cross-examination, the official testified that petitioner's convictions would be regarded as common crimes "because of the indiscriminate nature of the weaponry this man was constructing" (R. 852).

tical reasons rather than for his criminal conduct" (*id.* at A47). The Board explained (*id.* at A50) that petitioner's

> activities were the manufacture and supply of explosives to be used for terrorism. His political motivation alone does not justify his terrorist methods. Also, [petitioner's] crimes were committed in the Republic of Ireland, not in Northern Ireland. They are more like those of an anarchist, even if politically motivated.

Noting that "[t]he terrorist use of explosives has been universally condemned as atrocious in nature" (Pet. Supp. App. A47), the Board determined that "[t]he Republic of Ireland's prosecution of [petitioner] for his terrorist activities is a legitimate attempt to protect its citizens from the dangers caused by [petitioner's] criminal activities. * * * Such prosecution would not be persecution" (*id.* at A50, A52).[12]

Finally, the BIA rejected petitioner's various challenges to the deportation proceeding (Pet. Supp. App. A52-A54). In particular, the Board concluded that petitioner's claims concerning the recusal of Judge Hupp were "neither supported by the record nor any longer relevant, because of our independent review of the evidence on appeal. * * * There is also extensive evidence in the record supporting * * * [Judge Lyons'] conclusions" (*id.* at A53).

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[12] The absence of a well-founded fear of persecution also provided an alternative basis for affirming the denial of petitioner's application for asylum (Pet. Supp. App. A51, A52).

The BIA emphasized that its rejection of petitioner's claim of persecution "is the same whether we apply a standard of 'clear probability,' 'good reason,' or 'realistic likelihood' " (Pet. Supp. App. A51). Accordingly, the outcome in *INS* v. *Stevic* No. 82-973 (argued Dec. 6, 1983), will not affect this case and the petition need not be held pending the decision in *Stevic*.

6. The court of appeals affirmed in an unpublished decision (Pet. App. A1-A10). Noting that adjustment of status, asylum, and voluntary departure "are committed to the discretion" of the INS (*id.* at A3), the court found "no abuse of discretion in this case" (*ibid.*):

> Petitioner entered the United States by using a false name and a false passport. In order to obtain a visa, he lied not only about his identity, but also about his purpose in coming to this country. He overstayed the time permitted under the visa that he had obtained by misrepresentation. During the early stages of his deportation proceedings he refused to cooperate, even to the extent of revealing his true identity. These acts support the denial of discretionary relief.

Id. at A3-A4. The court also rejected petitioner's argument "that the BIA erred in failing to consider whether his crimes in the Republic of Ireland were political offenses" and "that, unless the BIA first determined that his crimes were nonpolitical, they could not consider the crimes as a factor in deciding whether to grant adjustment" (*id.* at A5); the court concluded that "insofar as they relate to the Republic of Ireland, petitioner's crimes were not political" (*id.* at A5-A6), and that his argument was without merit in any event because it "overlooks the many factors other than [his] convictions which warranted an exercise of discretion adverse to petitioner" (*id.* at A6).

In addition, the court of appeals affirmed the denial of petitioner's request for withholding of deportation (Pet. App. A6-A10). Applying its decision in *Stevic* v. *Sava*, 678 F.2d 401 (2d Cir. 1982),

cert. granted, No. 82-973 (Feb. 28, 1983),[13] the court held that petitioner's "vague and general claims" (Pet. App. A6) did not establish "a well-founded fear of [political] persecution" (*ibid.*),[14] and it rejected his contention that "his offenses were political and that punishment for them would be persecution" (*id.* at A8):

> The Republic of Ireland has a valid nonpolitical interest in protecting its citizens from serious crimes. The illegal possession of explosives and firearms presents a potential threat to any society in terms of danger to person and property, no matter who is the possessor or what his motives might be. The nonpolitical nature of the Irish Government's interest and the serious nature of the crime removes prosecution and punishment for these offenses from the realms of political persecution. * * * The Republic of Ireland also has a valid nonpolitical interest in prosecuting those who escape from prison, particularly when explosives are used to accomplish the escape.

Id. at A8-A9.

Finally, the court of appeals rejected "[p]etitioner's due process claims arising out of Judge Hupp's decision to recuse himself," finding them to be "so lacking in substance as to merit no discussion" (Pet. App. A10).

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[13] See page 13 note 12, *supra*.

[14] As the court pointed out (Pet. App. A7), "[t]he very fact that [petitioner] was willing to remain in the Republic of Ireland for a year or so after first learning of the alleged threat and that he had expressed the intent to return to his homeland belies the existence of even subjective fear."

ARGUMENT

1. Petitioner's principal contention (Pet. 11-18) is that his crimes in the Republic of Ireland were "purely political offenses" within the meaning of the excludability provisions of Section 212(a)(9) and (10) of the Act, 8 U.S.C. 1182(a)(9) and (10), and therefore, because those crimes would not be grounds to exclude him from the United States, they could not be considered in deciding whether to grant him discretionary relief from deportation. This contention is without merit and does not warrant further review.

a. Petitioner's argument rests on a fundamental misunderstanding of the Immigration and Nationality Act. The denial of petitioner's applications for discretionary relief [15] was based on the INS's exer-

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[15] Petitioner sought an adjustment of status under Section 245, 8 U.S.C. 1255; asylum under Section 208, 8 U.S.C. 1158; and voluntary departure under Section 244(e), 8 U.S.C. 1254(e). In addition, petitioner requested a discretionary waiver of the grounds for exclusion that rendered him legally ineligible for an adjustment of status (see Section 212(h) and (i), 8 U.S.C. 1182(h) and (i)); however, because the Board of Immigration Appeals denied an adjustment of his status as a matter of discretion and did not rely on his legal ineligibility for such relief, petitioner's application for a waiver of excludability is no longer relevant.

Petitioner also sought withholding of deportation under Section 243(h), 8 U.S.C. 1253(h). Withholding of deportation is not discretionary once the alien has established his statutory eligibility (see page 10 note 8, *supra*). Because petitioner has limited his argument in this Court to the denial of discretionary relief (see Pet. i, 18), and because he has not challenged the determination below that he failed to establish a well-founded fear of persecution (which is the substantive standard for withholding of deportation), his claim for this relief is not now at issue. In any event, for the reasons stated by the immigration judge (see page 10,

cise of discretion, not on petitioner's ineligibility for such relief as a matter of law. The "purely political offense" provisions in Section 212(a)(9) and (10) on which petitioner relies (Pet. i, 12) simply establish an exception to the general exclusion of aliens who have been convicted of crimes. In turn, because one of the requirements for an adjustment of status under Section 245 is that the alien be admissible into the United States, the "purely political offense" provisions also serve to remove a disqualification that would otherwise apply to aliens convicted of political offenses. Thus, in this case, any determination that petitioner's offenses were "purely political," and hence that he was not excludable based on those convictions, would only eliminate a bar to petiitoner's legal eligibility for adjustment of status; such a determination would not bear on the discretionary denial of the relief he sought. Contrary to the premise of petitioner's contention, it is illogical to assume—and petitioner has cited nothing in the language, history, or purpose of the Act to demonstrate that it was Congress's intention—that a consideration that does not constitute an absolute legal preclusion to relief from deportation cannot, by that very fact, be taken into account by the INS in deciding whether to grant or deny such relief in the exercise of its discretion. See *Jain* v. *INS*, 612 F.2d 683 (2d Cir. 1979), cert. denied, 446 U.S. 937 (1980), and cases cited therein.

b. In addition, petitioner's argument ignores the numerous considerations that, entirely apart from his

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supra), the BIA (see pages 12-13, *supra*), and the court of appeals (see pages 14-15, *supra*), the finding that petitioner did not prove a well-founded fear of persecution is correct and justifies the denial of his request for withholding of deportation.

offenses in the Republic of Ireland, amply justify the denial of his requests for discretionary relief. Petitioner's characterization that "[t]he Immigration Judge, Board of Immigration Appeals, and Court of Appeals all relied almost exclusively on [his] conduct in Ireland as the basis for denying discretionary relief from deportation" (Pet. 18) is flatly contradicted by the record in this case.[16]

The bases for the decisions below have previously been described (see pages 8-15, *supra*). The following are among the reasons found by the immigration judge, the BIA, and the court of appeals for the denial of discretionary relief to petitioner (Pet. App. A3-A4; Pet. Supp. App. A15-A16, A44-A45): petitioner's fraudulent entry into the United States by means of a false passport and false name; his deceitful obtaining of a visitor's visa through lies about his identity and his purpose for coming to the United States; petitioner's deliberate overstay past the time permitted under the visa; the fact that petitioner was never a bona fide visitor to the United States and had no meaningful ties to this country; petitioner's failure to seek asylum prior to his arrest by the INS; his refusal to cooperate with the INS once he had been apprehended; and the detrimental impact that such relief to petitioner would have on our relations with Great Britain and the Republic of Ireland. As the court of appeals correctly concluded (Pet. App. A4, A6), these factors "support the denial of discretionary relief. * * * [M]any factors other

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[16] Petitioner has not contested the determination that he is subject to deportation for violating the immigration laws of the United States. Thus, the only question is whether the INS abused its discretion in rejecting petitioner's claims for discretionary relief.

than petitioner's convictions * * * warranted an exercise of discretion adverse to petitioner." [17]

c. Finally, the immigration judge and the court of appeals properly found that petitioner's convictions in the Republic of Ireland were not for "purely political offenses" within the meaning of Section 212 (a)(9) and (10) of the Act, 8 U.S.C. 1182(a)(9) and (10). Petitioner's crimes involved the Republic of Ireland, not Northern Ireland, and therefore his violation of the Republic's laws, arising from the PIRA's conflict with Northern Ireland, was not "political" (Pet. App. A5-A6; Pet. Supp. App. A27 & n.7). Furthermore, petitioner's statement that his actions had a political motivation does not convert into purely political offenses his admitted involvement in the manufacture and supply of explosives to be used for terrorism (R. 1022, 1046). See Pet. Supp. App. A25-A27; *Eain* v. *Wilkes*, 641 F.2d 504, 518, 520-521 (7th Cir.), cert. denied, 454 U.S. 894 (1981). Finally, as the court of appeals explained in holding that petitioner had not established a well-founded fear of persecution in the Republic of Ireland (Pet. App. A8):

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[17] Indeed, neither the immigration judge nor the court of appeals relied on petitioner's convictions in the Republic of Ireland in holding that discretionary relief was inappropriate. To be sure, the BIA adverted to those convictions (Pet. Supp. App. A44) in "conclud[ing] that [petitioner] does not merit the favorable exercise of discretion" (*id.* at A45). But the Board also cited numerous other considerations to support its ruling that "[t]he immigration judge properly denied the discretionary applications for * * * relief" (*ibid.*); its references to petitioner's convictions, even assuming (contrary to our opening argument, see pages 16-17, *supra*) them to be outside the proper scope of the exercise of discretion, do not indicate an abuse of discretion in light of the additional reasons justifying the denial of relief to petitioner.

> The Republic of Ireland has a valid nonpolitical interest in protecting its citizens from serious crimes. The illegal possession of explosives and firearms presents a potential threat to any society in terms of danger to person and property, no matter who is the possessor or what his motives might be. The nonpolitical nature of the Irish Government's interest and the serious nature of the crime removes prosecution and punishment for these offenses from the realms of political persecution.

2. Petitioner also contends (Pet. 19-22) that the recusal of Judge Hupp deprived him of a fair deportation proceeding and that his request for discovery and a hearing on the recusal issue was erroneously denied. The court of appeals correctly concluded (Pet. App. A10) that this contention is "so lacking in substance as to merit no discussion."

The issue of Judge Hupp's recusal was unrelated to the questions of petitioner's deportability [18] or his applications for discretionary relief.[19] Thus, this issue does not, contrary to petitioner's assertion, have any bearing on the case "against him" (Pet. 20). Furthermore, as the Board of Immigration Appeals noted (Pet. Supp. App. A53), petitioner's claim of prejudicial error in the decision of Judge Lyons is no "longer relevant, because of [the BIA's] independent review of the evidence on appeal." Nor does petitioner either deny his unimpaired opportunity to present evidence on his own behalf or contest the

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[18] In fact petitioner had already conceded one charge of deportability (R. 1111).

[19] At the time of Judge Hupp's recusal, petitioner's only pending application for relief related to an adjustment of status. His remaining requests for relief were filed thereafter and were decided by Judge Lyons.

"extensive evidence in the record supporting" Judge Lyons' decision (*ibid.*). In these circumstances, the issue of the recusal of Judge Hupp is immaterial to petitioner's deportation, and Judge Lyons did not err in ruling that petitioner was not entitled to discovery or a hearing on the matter.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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